85-1798(1)

No. 85-____

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

May 1, 1986

183/p

QUESTIONS PRESENTED

The judgment below, which authorized a federal district court to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal, presents the following questions:

1. May a federal court treat an injunction of state court proceedings as "expressly authorized" by 42 U.S.C. § 1983, and therefore exempt from the Anti-Injunction Act, by transforming into "the state" every private litigant who invokes state judicial proceedings and may call on state officers to help enforce the resulting judgment?

2. Having declared that enforcement of a private litigant's state court judgment is actionable under § 1983, may a federal court avoid the comity principles of *Younger v. Harris* by declaring that the state has no cognizable interest in such enforcement proceedings inasmuch as the underlying action was between private parties?

3. Do *Younger* principles permit a federal court to excuse deliberate bypass of judicial remedies in a state's appellate system where there is no procedural bar to full and fair state court consideration of a litigant's constitutional challenges?

4. Under this Court's *Rooker* and *Feldman* decisions, may a federal court that concededly lacks appellate authority under 28 U.S.C. § 1257 nonetheless review the validity of alleged state barriers to effective appeal on the theory that the private litigant's deliberate bypass of state judicial relief from those supposed barriers permits treating the federal case brought by that litigant as original rather than appellate in character?

5. May a federal court intervene in a pending state court appeal to invalidate and enjoin the state's judgment lien and supersedeas bond provisions on the theory that the Due Process Clause entitles a civil judgment debtor to an affordable stay of judgment pending appeal?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this case, the State of Texas participated in the proceeding before the Court of Appeals for the Second Circuit as an Intervenor-Appellant. Pennzoil Company has no parent company or affiliates as those terms are used in Supreme Court Rule 28.1. Pennzoil's non-wholly-owned subsidiaries are:

National Transit Company
The Eureka Pipe Line Company
Proven Properties, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	ix
JURISDICTION	x
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	xi
STATEMENT OF THE CASE	1
THE QUESTIONS ARE SUBSTANTIAL	6
A. THE SECOND CIRCUIT'S RULING EVISCERATES THE ANTI-INJUNCTION ACT	9
(1) The Holding Below Makes Every Judgment Winner a State Actor Suable Under § 1983	10
(2) So Sweeping a View of § 1983 Cannot Have Been Contemplated by *Mitchum v. Foster*	12
B. THE SECOND CIRCUIT'S JUDGMENT REPUDIATES THE COMITY RULES DEVELOPED UNDER *YOUNGER V. HARRIS*	13
(1) *Younger*'s Abstention Rules Are Applicable Here	13
(2) Remedies Under Texas Law Meet the *Younger* Requirements	16

PAGE

C. THE SECOND CIRCUIT'S DECISION INFRINGES UPON THIS COURT'S EXCLUSIVE JURISDICTION TO REVIEW STATE COURT JUDGMENTS UNDER 28 U.S.C. § 1257..... 20

D. DUE PROCESS DOES NOT ENTITLE A CIVIL JUDGMENT DEBTOR TO A STAY PENDING APPEAL..... 23

E. THERE IS NO PRINCIPLED WAY TO CONTAIN THE EXPANSION OF FEDERAL JURISDICTION WROUGHT BY THE DECISION BELOW..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

Cases	PAGE
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	9, 20
Brown v. Texas, 443 U.S. 47 (1979)	19
City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam)	x
Chicago v. Atchinson, T. & S. F. R. Co., 357 U.S. 77 (1958)	x
Cobb. v. Georgia Power Co., 757 F.2d 1248 (11th Cir. 1985)	11, 12
Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam)	8
Cruz v. Donnelly, 727 F.2d 79 (3d Cir. 1984)	11, 12
Dennis v. Sparks, 449 U.S. 22 (1980)	11
Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890)	18
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	*passim*
Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir. 1982)	11, 12
Edwards v. California, 314 U.S. 160 (1941)	25
Evitts v. Lucey, 105 S.Ct. 830 (1985)	24
Fay v. Noia, 372 U.S. 391 (1963)	22
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)	23
Fuentes v. Shevin, 407 U.S. 67 (1972)	10
Hale v. Harney, No. 85-1472 (5th Cir. April 7, 1986), Slip. Op.	21
Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	12

PAGE

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) .....*passim*

Juidice v. Vail, 430 U.S. 327 (1977) 14, 15, 22

Lindsey v. Normet, 405 U.S. 56 (1972) 24

Louisville & Nashville R. Co. v. Stewart, 241 U.S. 261 (1916) 24

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) ...*passim*

Lynch v. Household Finance, 405 U.S. 538 (1972) 10, 11

M.I.C. Ltd. v. Bedford Township, 463 U.S. 1341 (1983) (Brennan, J., in chambers) 19

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 18

Migra v. Warren City School District, 465 U.S. 75 (1984) 22

Mitchum v. Foster, 407 U.S. 225 (1972) .....*passim*

Monroe v. Pape, 365 U.S. 167 (1961) 4, 20

Moore v. Sims, 442 U.S. 415 (1979) 17, 19, 22

National Union of Marine Cooks Stewards v. Arnold, 348 U.S. 37 (1954) 24

National Socialist Party v. Skokie, 432 U.S. 43 (1977) (per curiam) 19

Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (1975) (Blackman, J., in chambers) 19

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) 18

Ohio v. Akron Park District, 281 U.S. 74 (1930) 24

Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. 1980) 18, 19

Parson's Steel Inc. v. First Alabama Bank, 106 S.Ct. 768 (1986) 14

PAGE

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) . 4

Reyes v. Atkins, 619 S.W.2d 26 (Tex. Civ. App. 1981) . 19

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) . . . . *passim*

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) . 10

Texaco v. Pennzoil, No. 01-86-00216-CV 21

Texaco v. Pennzoil, 784 F.2d 1133 1

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) 21

United Benefit Fire Ins. Co. v. Metro. Plumbing Co., 363 S.W.2d 843 (1962) 17

Wainright v. Sykes, 433 U.S. 72 (1977) 22

Yandell v. Tarrant State Bank, 538 S.W.2d 684 (1978) . 17

Younger v. Harris, 401 U.S. 37 (1971) . . . . . *passim*

Vail v. Juidice, 406 F.Supp. 951 (S.D.N.Y. 1976) 15

Volkswagenwerk A.G. v. Falzon, 461 U.S. 1303 (1983) (O'Conner, J., in chambers) 8

Constitutional Provisions

U.S. Constitution, Fifth Amendment 28

U.S. Constitution, Fourteenth Amendment . . . . . *passim*

Texas Constitution, Art. I. § 13 18

Statutes

28 U.S.C. § 1257 . . . . . *passim*

28 U.S.C. § 2283 . . . . . *passim*

42 U.S.C. § 1983 . . . . . *passim*

Texas Civ. Prac. & Rem. Code § 65.013 18

PAGE

Texas Gov't Code § 22.002(a) (1986) 19

Texas Prop. Code Ann. § 52.001 2

Rules

Fed. R. Civ. P. 62 ..... 2, 17

Texas R. Civ. P. 364 ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 20, 1986, is reported at 784 F.2d 1133, and is reprinted as Appendix A. The opinion of the United States District Court for the Southern District of New York, dated January 10, 1986, is reported at 626 F.Supp. 250, and is reprinted as Appendix D.

JURISDICTION

Texaco brought this action for injunctive relief in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343. The District Court granted a preliminary injunction on January 16, 1986, see Appendix B, against enforcement of certain Texas bond and lien statutes, on the ground, *inter alia*, that their application to Texaco would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Appendix D.* The United States Court of Appeals for the Second Circuit, affirming in part and reversing in part, sustained the injunction against the Texas provisions on due process grounds. See Appendix A. The judgment was entered on February 20, 1986, see Appendix F, and the mandate issued on March 13, 1986. Appellant's motion to recall the mandate and to clarify, modify or stay the judgment was denied by the Court of Appeals on March 27, 1986. See Appendix G. Appellant filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Second Circuit on March 21, 1986. See Appendix H. After remand, on April 8, 1986, the District Court entered an amended injunction barring enforcement of Pennzoil's Texas judgment until the completion of all appeals in Texas and to this Court under 28 U.S.C. § 1257. See Appendix C.

The Second Circuit, by affirming the grant of a preliminary injunction against Pennzoil, has conclusively held the Texas supersedeas bond and judgment lien provisions unconstitutional as applied, leaving no federal issue to be resolved below. This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1254(2). *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (per curiam); *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958).

---

* The District Court's Supplemental Findings of Fact are set forth in Appendix E.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, § 2283 of the United States Code provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Texas Rule of Civil Procedure 364 provides:

> (a) *May Suspend Execution.* Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.
>
> (b) *Money Judgment.* When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

Texas Property Code, § 52.001 provides that:

> A first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing.

Texas Const. Art. I, § 13 is reprinted as Appendix K.

42 U.S.C. § 1983 is reprinted as Appendix L.

28 U.S.C. § 1257 is reprinted as Appendix M.

Texas Govt. Code § 22.002 is reprinted as Appendix N.

Fed.R.Civ.P. 62 is reprinted as Appendix O.

STATEMENT OF THE CASE

At issue in this case is the authority of federal district courts, notwithstanding the Anti-Injunction Act and judicially-crafted comity principles, to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal. Apart from its intrinsic interest as a matter of judicial federalism, this issue is of surpassing practical significance not only in cases like this one, involving enormous sums, but in the thousands of routine cases in which litigants cannot afford to post a bond that would stay an adverse judgment pending appeal.

Pennzoil Company sued Texaco Inc. in a Texas state court in February 1984 for intentionally inducing the breach of Pennzoil's binding agreement to acquire 3/7 of Getty Oil Company. In a 4-½ month trial, Pennzoil, in the words of the Second Circuit Court of Appeals (A41),[1]

> established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a reasult Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim.

The jury awarded Pennzoil compensatory damages of $7.53 billion, based on Pennzoil's evidence of what it would cost to replace the vast oil reserves that Pennzoil would have acquired under its lost agreement with Getty. (Texaco introduced no evidence on the issue of damages.) The jury also awarded $3 billion in punitive damages, bringing the total judgment entered on December 10, 1985, including prejudgment interest and costs, to $11.12 billion. (A126-27).

Texas law, like that of most states, provides that a party wishing to appeal from a money judgment "may suspend the execution of the judgment by filing a good and sufficient bond

---

1. Citations to the separately paginated appendices will be styled "A___."

. . ." Texas R. Civ. P. 364(a). To protect the rights of the prevailing party while the appeal is pending, Texas, like 30 other jurisdictions,[2] requires that the bond equal "at least the amount of the judgment, interest, and costs," *id.* 364(b), "[u]nless otherwise provided by law," *id.* 364(a).

A judgment debtor may appeal in Texas even without posting a supersedeas bond, but the prevailing party may then take steps to enforce its judgment while the appeal is pending. In particular, the judgment creditor may record its judgment in any Texas county and thereby acquire a lien on any property of the judgment debtor located in that county. Texas Prop. Code Ann. § 52.001.

No such threat of immediate enforcement existed with respect to Pennzoil's judgment against Texaco, however, for that judgment included, with the consent of both parties, so-called "stand-still" provisions carefully balanced to protect the interests of both litigants. See Appendix I. These provisions prohibited Pennzoil from taking any steps to enforce its judgment, and also barred Texaco from transferring or encumbering its assets except in the ordinary course of business, as long as the trial court retained jurisdiction of the case. (A127).

During this post-trial period, which lasted through March 25, 1986, Texaco was free to seek further relief in the Texas trial and appellate courts from the appeal bond and judgment lien provisions of Texas law, but it made no attempt to do so. Indeed, to this day, Texaco has never raised in a Texas court its objections to the validity or reasonableness of the Texas bond and lien provisions. Nor has Texaco moved in the Texas courts to obtain suitable alternative security arrangements, notwithstanding the fact that, after the judgment was entered, Pennzoil made a stipulation (Appendix J) in the Texas trial court waiving its right to a full bond and asking that court to fashion fair and suitable security under standards such as those contained in Fed.R.Civ.P. 62.

Several hours before the Texas court had even entered its judgment, Texaco, which had just given its consent to the stand-still provisions, filed suit against Pennzoil in the United

---

2. See n.17 *infra*.

States District Court for the Southern District of New York (White Plains Division). Purporting to rely on 42 U.S.C. § 1983, and alleging that the Texas bond and lien provisions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment (Complaint, Claims 3 and 6), Texaco asked the federal court in White Plains (a) to invalidate these wholly conventional security provisions, (b) to decide for itself what would be suitable security, and (c) to impose these arrangements on the Texas litigants and the Texas courts by means of an injunction. Texaco also sought immediate appellate review in the federal district court of the merits of the Texas judgment, alleging that that judgment burdened interstate commerce, frustrated the Williams Act, permitted Pennzoil to violate the Securities Exchange Act, and violated the Full Faith and Credit and Due Process Clauses of the Constitution (Claims 1, 2, 4, 5, and 7). (A5, A11, A57-58).

On December 17, 1985, Judge Brieant issued a temporary restraining order, and on January 16, 1986, he entered a preliminary injunction prohibiting Pennzoil from "taking any action of any kind whatsoever to enforce or attempt to enforce" its Texas judgment. (A52). The district court ruled that every one of Texaco's claims "raise[d] serious questions" about the "merits of the [Texas] judgment" (A63), that Texaco was likely to be successful in its Texas appeal (A62, A66), that no punitive damages should have been awarded (A64), and that compensatory damages "should in no event exceed $800 million" (A66). The court held the Texas statute requiring a supersedeas bond in the full amount of the judgment unconstitutional as applied to Texaco because it burdened Texaco's right to appeal to the Texas appellate courts, and to this Court under 28 U.S.C. § 1257, in violation of the Fourteenth Amendment. The district court required Texaco to post security of $1 billion as a condition for injunctive relief (A78), but otherwise left Texaco free to transfer or encumber the assets upon which Pennzoil would have to rely to collect its judgment.

On appeal, the United States Court of Appeals for the Second Circuit, on February 20, 1986, directed dismissal of all of Texaco's claims other than those attacking the Texas lien and bond provisions (Claims 3 and 6), holding that all but

those two claims could not be adjudicated by the federal courts since they had been litigated in the Texas courts. (A19-20). The court ruled that district court consideration of these claims would constitute an impermissible arrogation of appellate power: "reviewability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them." (A20).

But the Second Circuit reached a different conclusion with respect to Texaco's Claims 3 and 6—the claims challenging the Texas bond and lien provisions. The court reasoned that Texaco's deliberate decision *not* to raise the question of the validity of these provisions in the Texas state courts gave Texaco the right to raise that question in a federal court. (A21). It stated that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to bring a federal action rather than having to sue as a plaintiff in the state courts—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues and take them to the "concurrent" jurisdiction of a federal court. (A21-22). This is permitted, the court concluded, whenever a state court litigant decides *not* to submit to the state courts the issue of the validity of any state rule that is not "inextricably intertwined" (A22) with claims that have been adjudicated in the state courts.

The Second Circuit held that the Anti-Injunction Act, 28 U.S.C. § 2283, was likewise no bar to Texaco's Claims 3 and 6, because these claims were properly brought pursuant to 42 U.S.C. § 1983. Relying upon this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the court below declared Pennzoil to be acting "under color of" state law because "[e]nforcement of the state court judgment . . . necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitute joint action for the purposes of § 1983." (A26).

On the other hand, the court of appeals ruled that, although there was "an ongoing state proceeding" (A32), the principles

of federalism and comity animating *Younger v. Harris*, 401 U.S. 37 (1971), did not prevent the district court from issuing its injunction against Pennzoil, because Pennzoil—even though held to be an arm of the state for "state-action" purposes—was, for *Younger* purposes, merely a "private litigant" and its dispute with Texaco merely "a suit between two private parties" (A34). An injunction against Pennzoil thus did not prevent action by "any arm of the state" (A34); and neither Texas' interest in "protecting the rights of its citizens to obtain and enforce judgments in the Texas Courts," nor its "interest in the constitutionality of its statutes," was "important" or "substantial." (A32).

The Second Circuit further held that abstention was not required because, in its opinion, the Texas state courts do not provide "adequate procedures for adjudicating Texaco's federal claims" (A35). Without identifying a procedural bar to such adjudication, the court simply observed that "[t]here is no assurance" that the Texas appellate courts would grant Texaco an "immediate stay of execution" pending a ruling on the federal claim, nor that they would fix security in an amount that the court of appeals would deem "reasonable" (A37-38).

As to the merits of Texaco's attack on the Texas lien and bond statutes, the Second Circuit concluded, in effect, that a judgment debtor has a Fourteenth Amendment right to an affordable bond, and thus "declare[d] the Texas lien and bond provisions to be unconstitutional . . . as applied" (A35): "[D]enial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted . . . [would] amount[ ] to a confiscation of the judgment debtor's property without due process . . . [and] reduce its appeal to a meaningless ritual[,] [s]ince Texaco would be bankrupt or in liquidation by the time its appeals were decided . . . ." (A44). The Second Circuit proceeded to affirm the district court injunction prohibiting Pennzoil from taking any steps in the Texas courts to facilitate the enforcement of its judgment (A47-51), whether by invoking the lien and bond provisions, or by requesting other forms of protection to preserve the status quo.

Having affirmed injunctive relief for Texaco and having sustained the $1 billion bond ordered by the district court, the Second Circuit stated that further proceedings in the district court were "unnecessary" pending the disposition of the Texas appeal. (A48). The district court was to retain jurisdiction solely for the purpose of ruling on "any application with respect to the security terms of the injunction arising out of changed circumstances." (A51).

On March 21, 1986, contending that the decision below threatened to make its state court judgment uncollectable, Pennzoil moved the court of appeals to clarify, modify, or stay its judgment so that Pennzoil would at least be free to ask the Texas courts to extend the Texas trial court's "stand-still" order (see p. 2 *supra*) or otherwise to seek security in Texas apart from the Texas lien and bond provisions. The court of appeals denied this motion on March 27, 1986. See Appendix G.

THE QUESTIONS ARE SUBSTANTIAL

The judgment of the court below sanctions an unprecedented intrusion by a federal court into ongoing state court proceedings, opening a yawning breach in the wall of statutes and judicial doctrines erected by Congress and this Court as a barrier to just such intrusions. Despite that barrier, the Second Circuit ruled that a federal district court in New York may entertain a collateral attack on the validity of the application, in a Texas lawsuit, of Texas statutes governing security arrangements pending the appeal being pursued in that suit, and that the district court may displace those statutes and decide for itself what security is "reasonable" to protect the Texas judgment that Pennzoil won before a Texas jury and judge. The court of appeals turned the law on its head by insisting that the New York federal courts have this authority *because* Texaco deliberately bypassed the state courts and declined to present its constitutional objections in the ongoing Texas litigation.

The district court in White Plains has been given carte blanche to supplant the courts of Texas and to exercise continuing supervision over *pendente lite* security arrangements throughout the Texas litigation—preventing Pennzoil, on pain

of contempt, from pursuing *any* remedy in *any* Texas tribunal to protect its existing and—unless and until reversed—wholly lawful Texas judgment.

The Second Circuit accomplished this intrusion by constructing a contrived complex of exceptions to every one of the statutory and judicially elaborated comity rules that, in combination, embody the overarching principle that the state and federal judicial systems are independent and parallel, both subject to the governance of this Court, but without power—apart from exceptional and rigorously cabined circumstances—to supervise or interfere with each other's proceedings. By ruling that every state-court judgment winner becomes "an arm of the state" whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged, the court below radically expanded the scope of § 1983's application to the private sector, while simultaneously contracting the application of the Anti-Injunction Act, 28 U.S.C. § 2283; it thus dramatically reduced the impact of the statute through which Congress, ever since 1793, has voiced its steadfast insistence that the federal courts may not interfere with state court proceedings.

Then, in an abrupt about-face, the court of appeals also took out of play the judicially-crafted rule of comity expounded in *Younger v. Harris*, on the ground that Pennzoil, having just been ruled a state actor for § 1983 purposes, is magically transformed into a purely private actor for *Younger* purposes. The court thereby created a capacious zone within which comity is simply inapplicable because *neither* § 2283 *nor* abstention is operative—the former being suspended because the federal action seeks relief under § 1983 against a state-court litigant who is deemed to wield the power of the state, and the latter because that same state court litigation is nevertheless said to involve merely private parties and private interests and therefore to be undeserving of comity.

Finally, the court of appeals ruled that Texaco's deliberate bypass of the Texas state courts affirmatively justified Texaco's excursion to the federal courts, rather than constituting a decisive obstacle to the exercise of federal jurisdiction. What had been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have denied

Texaco access to this Court pursuant to 28 U.S.C. § 1257, *see, e.g., Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983) (O'Connor, J., in chambers); *Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (per curiam), was viewed by the Second Circuit as providing Texaco a privileged entree to a federal district court under § 1983. For Texaco's deliberate bypass was seized on by the court below as rendering inapplicable to this case the rule of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which hold that only this Court has authority, under 28 U.S.C. § 1257, to review any judgment of a state court. According to the Second Circuit, this rule can be eluded by the simple expedient of failing to raise a question in a state proceeding and slicing it out for separate collateral litigation in a federal district court, thereby undermining the carefully articulated system devised by Congress for the orderly raising of federal questions in pending state court litigation, with review first in the state courts and ultimately in this Court.

The Second Circuit's ruling surely warrants plenary review. It invites all losing state court litigants to invent new maneuvers for side-swiping ongoing state court proceedings. It creates a no-man's land within which *none* of the relevant comity statutes and rules is operative—a jurisdictional darkling plain where litigants shanghaied from state courts clash by night. At a minimum, the decision below authorizes every state-court judgment debtor who is unable to satisfy a state's *pendente lite* security requirements to bypass the state courts and mount a collateral attack on those requirements. The court below created for the first time a right, enforceable in a federal district court, to an affordable bond pending an appeal from a state court judgment.

The attempt of the court of appeals to limit its ruling to the "unique" circumstances at hand—to fashion a special Rule in Texaco's Case—has no principled basis and, if accepted, would create substantial equal protection problems. Moreover, the Second Circuit's ruling cannot be limited to issues concerning the validity of state laws governing security pending appeal. Numerous state procedural and structural rules governing the processing of litigation from initial filing to final appellate judgment are vulnerable to imaginative constitutional objec-

tions. Under the ruling below, *all* of these are now subject to collateral attack by state court litigants who will exploit the Second Circuit's no-man's land unless this Court acts now to eliminate it.

A. THE SECOND CIRCUIT'S RULING EVISCERATES THE ANTI-INJUNCTION ACT.

The Anti-Injunction Act, in force since 1793, provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act is a linchpin of federal-state judicial relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). The "lines of demarcation" contained in the Act are designed to permit each court system to function "independently of the other with ultimate review in this Court of the federal questions raised in either system." *Id.* The effectiveness of the Act, and thus the integrity of the dual court system, are seriously threatened by the Second Circuit's decision in this case.[3]

The Second Circuit held the Anti-Injunction Act inapplicable on the ground that Texaco's due process claim against Pennzoil constituted an action authorized by 42 U.S.C. § 1983 and therefore, under this Court's ruling in *Mitchum v. Foster,* 407 U.S. 225 (1972), an action in which an injunction is "expressly authorized by Act of Congress." By this holding, the court below effected an unprecedented expansion in the application of § 1983 to private defendants and thereby imperiled the continued vitality of the Anti-Injunction Act.

---

3. Although the injunction issued in this case was directed solely against Pennzoil, the Anti-Injunction Act—like the application of *Younger* abstention principles—"cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line R.R. Co., supra,* 398 U.S. at 297.

1. The Holding Below Makes Every Judgment Winner A State Actor Suable Under § 1983.

For Texaco's federal action to qualify as a § 1983 action, and thus one exempted from § 2283 under *Mitchum v. Foster*, Pennzoil must be deemed "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Relying on *Lugar*, the court of appeals held that Pennzoil fits into this category because, in order to enforce its judgment, "Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets." (A25).

This conclusion, which transforms into "the state" every state-court judgment winner who may call on state officers to help enforce his judgment, radically expands this Court's holding in *Lugar*—itself a decision that had extended the state-action concept. *Lugar* sustained a § 1983 claim against a private party who had invoked a state *pre*judgment attachment statute *before any judicial proceedings had occurred in the case*. The *Lugar* majority repeatedly stressed that the private party's joint action with state officials in that case involved a *pre*judgment attachment procedure, 457 U.S. at 927, 927 n.6, 932, and thus the judicially *un*supervised seizure by an *alleged* creditor of *disputed* property," *id.* at 933, 941 (emphasis added); the Court twice expressly stated that its holding "was limited to the particular context of prejudgment attachment." *Id.* at 939 n.21; *see id.* at 942.

In equating Texas' *post*-judgment, *post*-jury trial lien procedures with *Lugar*'s *pre*-judgment, *pre*-trial, *ex parte* attachment procedures, the Second Circuit completely ignored a fundamental and principled limitation on *Lugar*. When the state delegates to a private person the awesome power to interfere with others' property *before* there have been *any* judicial proceedings whatever, exercise of that power is subject to constitutional constraints.[4] But where a private person

4. *Lugar* thus falls within the line of cases including *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Lynch v. Household Finance*, 405 U.S. 538 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), which hold that the Due Process Clause requires a fair opportunity to be heard in connection with private creditors' resort to pre-judgment attachment, garnishment and

merely asks the state to help enforce a judgment duly rendered by a jury and confirmed by the courts, a holding that that private person has become the state simply because he has invoked normal state procedures completely obliterates the distinction between private and state action.

The critical line is between a state delegation permitting private parties "to substitute their judgment for that of [a] state official or body," *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), and a system that allows a private person to invoke state process after the state has *itself* determined the relevant rights and liabilities.[5] Under the Second Circuit's reasoning, all trial winners who may at some point seek to enforce their judgments become state actors fully subject to all the substantive constraints of the Due Process and Equal Protection Clauses and vulnerable to suit under § 1983 with respect to any constitutional claims that can be conjured by disgruntled trial losers. But as this Court noted in *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), "merely resorting to the courts and being on the winning side of a lawsuit" does not make a private party into a state actor under § 1983, any more than merely filing a complaint does. *Accord*, *Lugar, supra*, 457 U.S. at 939 n.21. The Second Circuit's decision conflicts both with that basic teaching and with the holdings of other courts of appeals.[6]

---

replevin procedures. Federal relief is available only because such *pre*-judgment procedures—which involve no assertion of judicial authority and indeed often occur before a complaint as been served—do not constitute "proceeding[s] in state court." *Lynch, supra*, 405 U.S. at 553; *see id.* at 554-55.

5. The Second Circuit reasoned that, since "state officials can act only upon Pennzoil's unilateral determination" (A28) to collect the damages awarded it by a judge and jury, this is not a case in which "the independent judgment of the state judiciary is called into play" (A27-28). Apparently a 4½ month trial does not, in the opinion of the court below, sufficiently involve "the independent judgment of the state judiciary."

6. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1201 (5th Cir. 1982) (initiation of mortgage foreclosure proceedings does not constitute state action); *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1252 (11th Cir. 1985) (regulated utility does not act "under color of" state law by obtaining a temporary restraining order from a state court). *See also Cruz v. Donnelly*,

2. So Sweeping a View of § 1983 Cannot Have Been Contemplated by *Mitchum v. Foster.*

By vastly expanding the application of § 1983 to private conduct, the holding below retroactively pumps new meaning into the exemption authorized by *Mitchum v. Foster* and thereby drastically erodes the force of the Anti-Injunction Act. That Act by its very terms comes into play only where state judicial proceedings have been invoked. But if the invocation of state judicial proceedings makes a private litigant a state actor whose conduct is actionable under § 1983 whenever a constitutional complaint against him can be invented, § 2283 will be cannibalized. Even if the Second Circuit's ruling is limited to state-court judgment winners, the result will be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes. Surely this is not what this Court contemplated when it decided *Mitchum v. Foster,* which was a real § 1983 action against a real government officer whose official activities constituted the sort of action at the core of Congress' concern when it "expressly authorized" injunctive relief under § 1983.

When asked to expand the coverage of § 1983, courts must consider what the expansion would do to the policies animating the Anti-Injunction Act. Such consideration is entirely missing from the analysis of the court of appeals. The court's approach entices state court judgment losers to mount collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process. It gives the lower federal courts a large and

---

727 F.2d 79, 82 (3d Cir. 1984) (a store operator and employee were not "state actors" when they summoned police officers who strip-searched plaintiff).

Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), rendered prior to *Lugar* and animated by the now discredited notion that every state-court litigant has a *right* to have a federal court adjudicate his federal claims, is no longer good law even in the circuit in which it was decided. *See Cobb v. Georgia Power Co.* (11th Cir.) and *Earnest v. Lowentritt* (5th Cir.), *supra*. Moreover, the *Henry* court stressed that "the federal plaintiffs had exhausted all avenues of emergency state relief available to them," 595 F.2d at 302; *id.* at 296, before filing their federal suit, and they therefore confronted an "immediately enforceable" judgment. *Id.* at 299. Texaco, not having exhausted such avenues, confronts no such thing.

wholly unjustified zone within which to enjoin ongoing state proceedings.[7] The Second Circuit's holding therefore merits plenary review by this Court.

B. THE SECOND CIRCUIT'S JUDGMENT REPUDIATES THE COMITY RULES DEVELOPED BY THIS COURT UNDER *YOUNGER v. HARRIS*.

Even if the Anti-Injunction Act is held not to bar the injunction issued at Texaco's behest, the "national policy forbidding federal courts to stay or enjoin state proceedings except under special circumstances" would compel the same result here. *Younger v. Harris*, 401 U.S. 37, 41 (1971). For *Mitchum v. Foster, supra*, expressly held that the fact that a case is brought under § 1983 (and thus is technically exempt from § 2283) does not "qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding," 407 U.S. at 243. The Second Circuit's failure to heed this admonition undermines *Younger* and plainly deserves plenary review.

1. *Younger*'s Absention Rules Are Applicable Here.

The court of appeals escaped its obligation to follow *Younger* by ruling that the *Pennzoil v. Texaco* lawsuit was a purely "private" dispute that did not implicate any important state interests. After forcing Pennzoil into the garb of a § 1983

---

7. The breadth of the injunction affirmed below illustrates the range of federal judicial intrusions portended by the Second Circuit's holding. For the injunction that the Second Circuit refused even to modify, see Appendix G, enjoins Pennzoil from going to the courts of Texas for *any* form of protection of its interests during the pendency of Texaco's appeal on the merits—even a mere extension of the bilateral stand-still that expired on March 26, 1986. Yet the *only* exception to § 2283 even *suggested* in this case—§ 1983—bears *at most* upon the injunction against the lien and bond provisions, the only Texas laws ever challenged by Texaco. Any bootstrap plea for jurisdiction over *unchallenged* Texas procedures as a means of effectuating the judgment against those that were challenged is powerful evidence that Texaco's purported § 1983 claim against the bond requirement is nothing more than a subterfuge for a collateral federal attack on the Texas judgment itself, resting on undifferentiated disdain and hostility toward the Texas judiciary.

state actor in order to evade the strictures of § 2283, the Second Circuit stripped Pennzoil of that same attire in order to escape the federal court abstention compelled in this case by *Younger*. Having previously declared that, for the purposes of §§ 1983 and 2283, "Pennzoil cannot be divorced from [the Texas] enforcement procedure merely because a court authorized execution of the judgment" (A26), the court below proceeded to divorce Texas itself from its own enforcement procedures by holding that "the state has no interest in the underlying action" in this case (A34).

The court of appeals thus created a zone within which *all* rules of comity are rendered entirely inoperative. It thereby made nonsense of the law. If Pennzoil is to be deemed "the state" for § 1983 purposes, this must be *because* its activities implicate the *public* powers of the state. But if the public powers of the state are in fact implicated, *Younger* concerns come into play for that very reason: the point of the *Younger* doctrine is to assure that the use of state courts for the effectuation of the state's public policies not be subject to federal interference, except in narrowly defined extraordinary circumstances. To conclude, as the court below did, that a § 1983 action is so private that it escapes *Younger* is a contradiction in terms: *by definition* the § 1983 action is an action against *public* authorities to curb the exercise of *public* power—power "under color . . . of state law"—and sensitivity to comity interests therefore becomes absolutely imperative.[8]

In holding *Younger* inapplicable, the court of appeals also disregarded both the specific holdings and the animating philosophy of this Court's cases in the *Younger* line.[9] Thus, in

---

8. For this reason, the Court does not in this case have to decide the much-controverted question whether *Younger* should apply to "purely" private litigation. That question would, of course, be important only where § 2283 would not itself be a bar to an injunction. *Cf. Parson's Steel Inc. v. First Alabama Bank*, 106 S.Ct. 768, 773 (1986), where this Court directed the district court on remand of a private civil case "to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum v. Foster*."

9. In *Juidice v. Vail*, 430 U.S. 327 (1977), this Court expressly warned against narrow and wooden interpretations of the *Younger* rule: "We now hold . . . that the principles of *Younger* and *Huffman* are not confined

Juidice v. Vail, 430 U.S. 327 (1977), the federal plaintiff was, like Texaco, a state court judgment debtor, and the judgment was also entered in a private civil lawsuit. There, as here, the federal claim was a § 1983 action challenging state laws and procedures enabling a successful plaintiff to protect his interest in the judgment—in that case, by moving for contempt in the event the adjudged debtor failed to appear for a deposition about the assets for satisfaction of the judgment. 430 U.S. at 329-30.

The Second Circuit's conclusion that "[h]ere the state has no interest in the underlying action" (A34), would have been just as apt—or inapt—in *Juidice*, where New York had no particular interest in the private financial dispute underlying the privately-taken deposition and the privately-issued subpoena. But just as New York had a substantial interest—requiring federal abstention—in "civil contempt proceedings . . . initiated by private parties to enforce compliance with subpoenas issued by private attorneys," *Vail v. Juidice*, 406 F.Supp. 951, 958 (S.D.N.Y. 1976), so Texas has a vital interest in the functioning and enforcement of its bond and lien laws, "process[es] through which [it] vindicates the regular operations of its judicial system," *Juidice v. Vail*, 430 U.S. at 335.

The court of appeals opined that to allow *Younger* to operate here "would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum* that federal courts are empowered by § 1983 to enjoin ongoing state proceedings." (A32). But *Mitchum* itself made it absolutely clear that its ruling is not in any way "undermined" by the applicability of *Younger*; in fact, the Court *justified* its conclusion in *Mitchum* by noting that *Younger* comity principles will be operative even though § 2283 is not. *Mitchum* thus clearly stands for the proposition that, in *real* § 1983 actions seeking to enjoin *real* state officials and agencies from litigating in state courts, *Younger* is fully applicable.

The court below now holds that, when a self-styled § 1983 action is brought against private persons, federal injunctions

---

solely to the type of state actions which were sought to be enjoined in those cases," 430 U.S. at 334.

may be granted entirely without comity constraints. This has the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies.

When combined, the Second Circuit's § 1983 and *Younger* holdings spawn an entirely new and populous breed of federal lawsuits aimed at the actions of ordinary citizens and corporations who happen to have garnered an enforceable judgment in a state court. Since fundamental principles of comity do not apply in the no-man's land inhabited by this species of litigation, nothing remains to prevent such lawsuits from repeatedly disrupting pending state judicial proceedings. The Second Circuit's holding that *Younger* is entirely inapplicable to this case flies in the face of this Court's governing cases and creates an ominous gap in fundamental principles of comity. It consequently merits plenary review by this Court.

2. Remedies Under Texas Law Meet The *Younger* Requirements.

The Second Circuit held that Pennzoil had not satisfied another requirement for *Younger* abstention—namely, that the Texas state courts provide adequate procedures for the adjudication of Texaco's federal claims. (A35). Yet to this day, Texaco has made no attempt to raise its objections to the application of the Texas lien and bond provisions in the Texas courts. Texaco had three full months, during which the judgment was stayed by the stand-still order, to obtain a ruling from the trial court on the constitutionality of the lien and bond provisions and, absent a favorable ruling, to seek review in the Texas appellate courts, either by expedited direct appeal or by mandamus. The Second Circuit nevertheless concluded that it was unreasonable to ask Texaco initially to present its complaint about a Texas rule to the Texas court in which it was currently litigating. (A37-38).

The Second Circuit based its conclusion about lack of Texas procedures on a series of distrustful speculations about Texas law and Texas courts. The court below stated that it "appears unlikely" that Texaco "could have been assured" of a decision

on the constitutional issues by the Texas trial court (A35), and that there was "no assurance" that the Texas appellate courts would have granted relief to Texaco in a timely fashion if Texaco had sought that relief. (A37). The Second Circuit further speculated that seeking relief from the bond requirement in Texas would have been futile since the rule had consistently been enforced "as written," and therefore "the Texas trial judge would in all probability deny relief sought on constitutional grounds" (A36).

The focus of these speculations is entirely misplaced. The "pertinent inquiry" is *not* when and how the Texas courts might rule but whether "state procedural law *barred presentation* of [Texaco's] claims." *Moore v. Sims*, 442 U.S. 415, 432 (1979) (emphasis added). In the absence of such a bar, *Younger* abstention is required—and may not be waived on the basis of self-serving predictions that recourse to the state courts would be "futile" because those courts will rigidly apply as written the statutes the state court litigant seeks to challenge. No such procedural *bar* exists in this case, and the Second Circuit did not even suggest otherwise. Indeed, there is no indication that the Texas trial or appellate courts could not have fashioned an arrangement like the stand-still order pending appeal, particularly in view of Pennzoil's express stipulation in the Texas trial court that it would not demand the imposition of an appeal bond in the full amount of the judgment.[10]

---

10. The Second Circuit denigrated Pennzoil's waiver of its state-created right to a full bond as a mere "unilateral request" to the Texas trial court to determine security pending appeal by applying the standards of Fed.R.Civ.P. 62. (A48). Yet if the challenged Texas lien and bond provisions indeed operate only upon Pennzoil's "unilateral determination" (A28), it is unclear at best how the Second Circuit found any Article III "case" or "controversy" over Pennzoil's hypothetical invocation of those provisions against Texaco, since Pennzoil expressly *waived* whatever "unilateral" rights those provisions conferred upon it. Pennzoil's waiver, duly filed in the Texas trial court as a "stipulation" pursuant to Texas practice (Appendix J), is effective as a matter of Texas law to bind Pennzoil. The lien and bond provisions were intended for the benefit of judgment creditors such as Pennzoil, and their waiver obviously does not adversely affect the rights of the judgment debtor—just the opposite. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684 (1978); *United Benefit Fire Ins. Co. v. Metro. Plumbing Co.*, 363 S.W.2d 843 (1962). Even the district court recognized that "consent" by Pennzoil would remove the alleged constitutional defect in the lien and bond statutes. (A68, A75).

If the burden the Texas bond requirement imposes on Texaco is as unprecedented and uniquely devastating as the Second Circuit evidently believed (*see* A39-40), there could be no reason short of general mistrust of the Texas courts to assume that those courts would remain unmoved and would blindly apply other bond precedents. "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis in original). The Second Circuit nevertheless indulged just that presumption—one which was especially inappropriate here. The Texas Supreme Court has repeatedly and emphatically held that the "open courts" provision of that State's own Constitution, Art. I, § 13, see Appendix K, *requires* a Texas court to suspend the literal operation of any statutory or other condition that, as a practical matter, renders unavailable the access to appellate courts that Texas law secures. Thus, in *Dillingham v. Putnam*, 109 Tex. 1, 5, 14 S.W. 303, 305 (1890), the court stated:

> "[A]n Act of the Legislature which makes the right . . . to prosecute an appeal . . . depend on the giving of a supersedeas bond, without reference to the ability or inability. . . to give such bond, is violative of the [Texas] Constitution."

See Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984) (reaffirming *Dillingham*).[11]

---

11. In *Pace v. McEwen*, 604 S.W.2d 231 (Tex.Civ.App. 1980), the Texas intermediate appellate court enjoined enforcement of a trial court order just ten days after entry because that order, requiring a judgment debtor to turn over real estate for sale in satisfaction of the judgment, effectively rendered the appeal meaningless. The *Pace* court viewed its injunction as necessary to preserve its own appellate jurisdiction, *id.* at 232-33, and further held that the trial court itself had the power to grant the same injunctive relief "to prevent damage to an appellant," *id.* at 233.

That power is codified by statute: Texas Civil Practice and Remedies Code § 65.013 provides that "[a]n injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against." This statutory authorization is particularly

Even if the Second Circuit were correct that, as a practical matter, the Texas courts could not or would not act with sufficient speed,[12] Texaco would have an available remedy in this Court under 28 U.S.C. § 1257, because Texaco would then have satisfied that statute's requirement of exhausting remedies in "the highest court of a state in which a decision could be had." *See Brown v. Texas*, 443 U.S. 47, 50 (1979). Thus, a Circuit Justice of this Court could grant a stay of the judgment pending appeal through the state system and review in this Court. *See, e.g., M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1342-43 (1983) (Brennan, J., in chambers). *See also Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1327-29 (1975) (Blackmun, J., in chambers).

It is the central teaching of this Court's decisions that, throughout state court proceedings, litigants must exhaust their judicial remedies unless there is a clear "procedural bar" to the raising of the federal issue in the state courts. *Moore v. Sims*, *supra*, 442 U.S. at 430-31 n.13. This obligation includes the duty to exhaust the state appellate system. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The court of appeals gutted this rule by holding that a state litigant is free to withhold its federal claim from the state courts and resort to a federal court on the basis of abstract and hostile speculations about the effectiveness and timeliness of the state's remedial system. The result is an open incentive to state court litigants to carve particular issues out of pending cases and cart them to a federal district court in search of what they perceive to be a more favorable

---

significant in light of the broadening language that was added to Rule 364 itself in 1984. As amended, that rule provides that execution of a judgment may be suspended only by the filing of a full supersedeas bond, "[u]nless otherwise provided by law. . . ." Tex.R.Civ.P. 364 (a).

12. *Pace* confirms that the Texas appellate courts are capable of hearing and deciding Texaco's petition for relief from Rule 364 in very short order indeed. Additional avenues by which Texaco could seek relief from the bonding requirement include a petition to the Texas Supreme Court for a writ of mandamus (*see* Tex. Gov't Code, § 22.002(a) (1986), reprinted in Appendix N), or an original proceeding for injunction in the Texas Court of Civil Appeals. *See Reyes v. Atkins*, 619 S.W.2d 26 (Tex. Civ. App. 1981).

resolution. Precisely the same mode of analysis would support piecemeal shopping trips to federal forums on numerous procedural and structural issues that can readily be labeled "collateral" and made the basis of a supposedly independent cause of action under § 1983. The upshot is to allow litigants to assemble jurisdictional sandwiches to suit their tastes—a state slice here, a federal slice there. This prospect is sufficient to merit this Court's plenary attention.

C. THE SECOND CIRCUIT'S DECISION INFRINGES UPON THIS COURT'S EXCLUSIVE JURISDICTION TO REVIEW STATE COURT JUDGMENTS UNDER 28 U.S.C. § 1257.

For more than sixty years, this Court has steadfastly maintained that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Even with respect to federal constitutional defects, "[r]eview of such judgments may be had only in this Court." *Id.* The sole recourse of the party alleging such a defect is to present its constitutional questions to the state courts in the first instance and ultimately to this Court on review. Any other rule would be irreconcilable with the principles of comity inherent in our dual court system. *See Atlantic Coast Line R.R. Co., supra*, 398 U.S. at 288.

The court below nonetheless held that the district court in White Plains had jurisdiction to grant relief with respect to Texaco's arguments against the Texas bond and lien provisions as applied to this $11 billion judgment because these arguments *had not been presented to the Texas trial court* and were not "inextricably intertwined" with claims that *had* been so presented. (A22-23). The Second Circuit reasoned that, as to issues that are unrelated "to the merits of [a] judgment" (A23, A41) and that the litigant has "chose[n] to withhold from the state court" (A21), the rule of *Monroe v. Pape* gives the federal courts an independent "concurrent" jurisdiction to which dissatisfied parties may resort without exhausting state remedies. That cannot be.

First, there is no authority whatever for the proposition that *Rooker-Feldman* applies only to substantive claims concerning the merits of a case and not to the numerous procedural and structural issues posed by the processing of state court litigation. Under 28 U.S.C. § 1257, this Court reviews "judgments or decrees", not issues; the enforceability of the judgment obtained by Pennzoil in Texas is the very matter that the courts below purported to review, and the very matter that those courts stayed.

Second, it is an error—and one placing the Second Circuit in conflict with the Fifth[13]—to suppose that the *Rooker-Feldman* doctrine may be limited to instances in which a federal court is literally asked to review the result of a state court adjudication. The whole point of that doctrine is that Congress has never conferred upon the lower federal courts the authority to *displace* state courts (and ultimately this Court) in the appellate process. It matters not whether such displacement takes the form of direct review by a lower federal court of a state court judgment, or the form of collateral federal attack on the validity, as applied to that judgment, of the state laws rendering the judgment immediately enforceable. For only the courts with jurisdiction to hear appeals have power to review and correct procedural barriers that limit the value of those appeals.[14]

Third, this Court's decision in *Huffman v. Pursue, Ltd.*, *supra*, explicitly rejects the notion that § 1983 provides a "concurrent" federal forum for constitutional claims even if

---

13. *See Hale v. Harney*, No. 85-1472 (5th Cir. April 7, 1986), Slip Op. (upholding dismissal of complaint under *Rooker-Feldman* even though some of the constitutional challenges to Texas law had not been submitted to the Texas courts); *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985).

14. On the Second Circuit's theory, Texaco should have been free to file its request for additional argument time before the Texas Court of Appeals not in that court, See Motion to Enlarge Time for Oral Argument in *Texaco v. Pennzoil*, No. 01-86-00216-CV, but as a civil rights action in federal district court, claiming that a 20-minute oral argument limit in a multibillion-dollar case makes the appeal an exercise in futility.

interference with pending state court proceedings results. Although a party normally need not exhaust state remedies before bringing a § 1983 action as an original matter, the *Huffman* Court noted that this principle has "nothing to do" with the issue of "the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues." 420 U.S. at 609 n.21.

Fourth, the Second Circuit's erroneous conclusion that Texaco's deliberate bypass of the Texas courts *opens*—rather than closes—the doors of the federal courthouse creates a looking-glass inversion of federalism that is all the more bewildering in the wake of this Court's opinion in *Feldman*. There the Court dealt with the bypass issue and concluded that bypassing the state courts did *not* authorize otherwise impermissible federal court litigation:

> [T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does *not* mean that a United States district court should have jurisdiction over the claims. *By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.*

460 U.S. at 482-84 n.16 (emphasis added).

As this Court observed in *Feldman*, "[t]his result is eminently defensible on policy grounds." *Id.* And the rule that executing an end-run around the state courts may make a federal forum unavailable for those constitutional claims is hardly unique to *Rooker-Feldman*: the same rule prevails under *Younger*; *see, e.g., Moore v. Sims*, *supra*, 442 U.S. at 432; *Huffman v. Pursue, Ltd.*, *supra*, 420 U.S. at 609; *Juidice v. Vail*, *supra*, 430 U.S. at 337; in the area of federal habeas corpus, *see, e.g., Fay v. Noia*, 372 U.S. 391 (1963); *Wainright v. Sykes*, 433 U.S. 72 (1977); and with respect to *res judicata* questions in § 1983 cases, *see, e.g., Migra v. Warren City School Dist.*, 465 U.S. 75 (1984). The contrary rule embraced by the Second Circuit's holding—begetting a species of "civil habeas corpus" without any exhaustion requirement—replaces

federal comity with an *anti*-comity principle and legitimates the familiar litigator's trick of "sand-bagging" issues. This topsy-turvy result, making the district court in a collateral proceeding a more potent and inviting forum than this Court on direct review, merits the plenary attention of this Court.

D. DUE PROCESS DOES NOT ENTITLE A CIVIL JUDGMENT DEBTOR TO A STAY PENDING APPEAL.

In addition to violating three distinct but related jurisdictional barriers in upholding the district court injunction, the Second Circuit concocted a novel due process right that is at odds with this Court's decisions.

In order to state a claim under § 1983, Texaco was required to show that it had been "deprived of a right 'secured by the Constitution and the laws' of the United States." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978), quoting 42 U.S.C. § 1983. The court of appeals reasoned that conditioning a stay of execution on Texaco's posting of a $12 billion supersedeas bond "would at least amount to a deprivation of [Texaco's] property in violation of its right to due process" (A24), since such a bond could force Texaco into bankruptcy "by the time its appeals were decided" (A44).

The Second Circuit's conclusion that Texaco has a due process right to avoid application of the Texas bond and lien provisions is both unprecedented and unwarranted. First, it is problematic whether any "deprivation" of a "judgment debtor's property" (A44) is at stake, since the amount in question has been adjudicated to be a debt Texaco owes to judgment creditor Pennzoil. Texaco cannot complain of being "deprived" of property which it no longer unqualifiedly "owns." Second, the transfer of ownership of that sum of money from Texaco to Pennzoil was hardly accomplished "without due process" (A44), for Texaco had notice of the claim against it and a full and fair opportunity to be heard: after a 4-½ month trial in a court of law, a jury found that Texaco had tortiously deprived Pennzoil of billions of dollars when it took away Getty's assets; Texaco has enjoyed the benefits of those wrongfully obtained billions for more than two years.

Due process does not require a state to go further and provide access to an appellate court. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930). Of course, once Texas created an appellate system, the Constitution foreclosed the option of limiting the right of appeal by irrational or arbitrary requirements. *Evitts v. Lucey*, 105 S.Ct. 830, 840 (1985). But Texas has *not* limited Texaco's appeal rights: Texaco has in fact perfected its appeal by filing a notice of appeal and posting a small bond to cover appeal costs; and Texaco's prosecution of that appeal in no way depends upon its posting of any security for the judgment, upon its obtaining a stay of the judgment's execution, or upon a suspension of the Texas judgment lien provisions.

What the court below really held is that the Fourteenth Amendment denies Pennzoil the security Texas law deems necessary to protect its trial victory by entitling Texaco to avoid, pending appeal, the consequences of its trial loss. But until the ruling below, it was well established that a civil litigant has no due process right to be free from the execution of a judgment pending its appeal. In fact, this Court has expressly so held. In *National Union of Marine Cooks Stewards v. Arnold*, 348 U.S. 37 (1954), a judgment debtor refused to file a bond protecting the judgment creditor pending appeal and, in order to "safeguard the collectability" of the judgment, the state court dismissed the debtor's appeal. *Id.* at 41. This Court concluded that there had been no violation of the Due Process Clause, stating that "[w]here the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." *Id.* at 44. *A fortiori* Texaco, with its right to appeal unaffected by the Texas appeal bond and judgment lien provisions, has no right to be free from security requirements pending appeal. There is "no obligation upon the State to provide for suspension of judgment" pending whatever appeal process it has made available. *Louisville & Nashville R. Co. v. Stewart*, 241 U.S. 261, 263 (1916) (unanimously holding that a state may require a 110% supersedeas bond pending appeal of a money judgment).

The Second Circuit nonetheless insists that Texas has imposed an irrational burden on Texaco's right to appeal by

requiring Texaco to post a $12 billion bond as a condition of a stay.[15] But there is nothing irrational in Texas' decision to safeguard fully the interests of those who have won judgments in Texas courts. States are free to strike their own balance between the interests of judgment creditors and those of judgment debtors. Some states, like Rhode Island, favor the debtor and require the trial court automatically to stay execution upon the filing of a notice of appeal,[16] without regard to the fact that this may leave the debtor free to encumber or transfer assets, rendering the judgment uncollectable in the event it is upheld on appeal. Many other states, like Texas, have decided that, once a trial is complete, the judgment creditor is entitled to assurance that it will be able to collect the award if it is ultimately affirmed. Nothing in the Due Process Clause empowers a federal court to arrogate to itself the authority to countermand that state policy choice simply because the federal tribunal might strike the balance differently or come to a different conclusion about the threat to the judgment creditor's interests.

For the Second Circuit to hold that Texaco is entitled, as a matter of federal law, essentially to proceed with business as usual, *as though the Texas trial court had never entered a judgment against Texaco*, is to hold that the Texas judicial system has no claim at all in the matter until all appeals within and from that system have been exhausted. To state that contention is to refute it: the most elementary axioms of respect for state judicial proceedings preclude reducing state court judgments, throughout the pendency of the state appellate process, to empty declarations of abstract rights—like so many "bequest[s] in a pauper's will," *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

The Second Circuit's adherence to a dubious due process theory which flies in the face of this Court's long-settled

---

15. That is, *if* a full bond were in fact to be required—an issue that has, of course, never been resolved because Texaco has successfully prevented its resolution in the Texas courts.

16. R.I.R.Civ.P.62(c). Other states providing for automatic stay of execution upon appeal include Connecticut, Conn.R.Ct. § 3065; Maine, Me.R.Civ.P.62(e); Massachusetts, Mass.R.Civ.P.62(d); New Hampshire, N.H.Ct.R.Ann.74; and Vermont, Vt.R.Civ.P.62(e).

precedents is of more than academic interest. Texas is only one of 30 states (plus the District of Columbia) that presumptively require a supersedeas bond equal to or greater than the judgment as a condition to a stay of execution pending appeal.[17]

The threat to the orderly administration of justice in those jurisdictions posed by the judgment below requires this Court's plenary attention.

E. THERE IS NO PRINCIPLED WAY TO CONTAIN THE EXPANSION OF FEDERAL JURISDICTION WROUGHT BY THE JUDGMENT BELOW.

Apparently concerned that its ruling would open the doors to numerous federal intrusions into ongoing state court litiga-

---

17. The law in 14 other states requires, like Texas Rule 364, the posting of at least a full bond: Alabama, Ala.R.CivP.62(d), Ala.R.App.P.8(a); Arkansas, Ark.R.Civ.P.62(d), Ark.R.App.P.8(c); Delaware, Del.Const., Art.IV, § 24, Del.R.Civ.P.62(d), Del.Sup.Ct.R.32(c); Iowa, Iowa R.App.P.7; Louisiana, La.Code Civ.P. Art. 2124 (West 1986); Michigan, Mich.R.Civ.P. 2.614(D), Mich.R.App.P. 7.101(H)(1)(c); Minnesota, Minn.R.Civ.P.62.03, Minn.R.App.P.108.01(3); Nebraska, Neb.Rev.Stat. § 25-1916(1) (Supp. 1981); New Mexico, N.M.R.Civ.P.62(d); New York, N.Y.Civ.Pract.Law § 5519(a)(2) (Consol.1978); Oklahoma, Okla.Stat.Ann. tit. 12, § 968 (West Supp.1985), Okla.R.Civ.App.P. 1.13; Oregon, Or.Rev.Stat. §§ 19.038, 19.040 & 19.045 (1981), Or.R.Civ.P.72(a); South Dakota, S.D.Codified Laws Ann. §§ 15-6-62(d), 15-26A-25, 15-26A-26 (1984); Virginia, Va.Code § 8.01-676.1(a) & (c) (1985).

Sixteen additional jurisdictions have laws presumptively requiring a full bond, but explicitly allowing the trial court some equitable discretion to reduce the size of the bond: Alaska, Alaska R.Civ.P.62(d), Alaska R.App.P.7(d); Arizona, Ariz.R.Civ.App.P.7(a); District of Columbia, D.C.R.Civ.P.62-I, D.C.R.App.P.8(b); Georgia, Ga.Code Ann. § 5-6-46(a) (1985); Idaho, Idaho R.Civ.P.62(d), Idaho R.App.P.13(b)(14); Indiana, Ind.R.Civ.P.62(d); Kansas, Kan.Stat.Ann. § 60-2103(d) (1983); Kentucky, Ky.R.Civ.P. 62.03 & 72.04; Maryland, Md.R.App.P.1018(b)(1); Mississippi, Miss.Code Ann. §§ 11-51-31 & 11-51-53 (Supp. 1985); Missouri, Mo.R.Civ.P.81.09(b); New Jersey, N.J.R.App.P.2:9-5 & 2:9-6; Pennsylvania, Pa.R.App.P.1731; Tennessee, Tenn.R.Civ.P.62.04 & 62.05; Washington, Wash.R.App.P.8.1(b); Wyoming, Wyo.R.Civ.P.62(d), Wyo.R.App.P.2.07. Such provisos cannot distinguish the rule in those states from the rule at issue here. For the nub of Texaco's complaint here must be that the *the particular bond demanded in this case* would work the same injury as immediate execution of Pennzoil's judgment. Had a $12 billion bond been set in the discretion of a Texas judge after a full hearing, Texaco could still go to a federal court to claim a violation of due process.

tion, the court of appeals purported to limit its decision to "the extraordinary circumstances of this case, which are unlikely ever again to recur," including the large amount of the judgment, the "clear inability" on the part of the judgment debtor to comply with the supersedeas bond requirement, and the "prospect" that the state courts would not rule on Texaco's constitutional objections before the judgement was enforced. (A50). The Second Circuit's effort to create a Rule in Texaco's Case limited solely to the particular facts of this litigation is unavailing.

Some 31 jurisdictions have statutory bond requirements as demanding as those of Texas, and nearly every jurisdiction in the nation requires a supersedeas bond under some circumstances. The judgment below exposes every one of these provisions to collateral, post-trial attack in the federal courts. Whenever a judgment debtor must post a bond—whether its size is set by statute or by a state court's discretion—large enough to threaten that debtor with the same irreversible injury that would accompany immediate execution of the judgment, the rationale of the Second Circuit would justify federal judicial intervention.

It is true, of course, that the size of the judgment against Texaco is unprecedented. But it is no larger, in relation to Texaco's assets, than thousands of judgments entered against less wealthy parties. It could be just as difficult or "impossible" for a "Mom-and-Pop" grocery store that had been held liable for $100,000 or even $10,000 in damages in a slip-and-fall tort action to post a bond in that amount as it is for Texaco to secure the Pennzoil judgment. Mom and Pop could likewise allege that execution of the judgment before the completion of the appeals process would leave their business—and perhaps their lives—irreversibly altered.[18] Such lawsuits and such judg-

18. And judgment *creditors* compelled by state courts to stay execution of their hard-won victories pending appeal, without the security of what those parties would deem an adequate bond, *see* n.16 *supra*, would no doubt dash to federal court for injunctions compelling the state tribunals to demand a larger bond or to permit immediate enforcement. A judgment creditor denied adequate security can readily allege that the state court or state rule which has risked making the judgment ultimately uncollectable has indeed worked irreversible harm and wrought an unconstitutional deprivation.

ments, accompanied by such circumstances, are quotidian, not "rare." Limiting the Rule to Texaco—or to large companies with large judgments against them—would be blatantly arbitrary and would create a wealth-based classification that itself would raise serious equal protection questions under the Due Process Clause of the Fifth Amendment.[19]

Indeed, the Rule in Texaco's Case cannot be confined to issues surrounding security pending appeal. The state statute books are stuffed with procedural and structural rules governing the processing of private disputes through the state trial and appellate courts, and the law reporters are filled with cases attacking the fairness and reasonableness of such rules and alleging that their enforcement would work irreparable harm. Under the Second Circuit's ruling, all these issues are easy prey to federal collateral attack during ongoing state proceedings; all that is needed is a deliberate bypass of the state courts and a bit of artful pleading to make it appear that the federal defendant is suable under § 1983 because his invocation of state judicial proceedings—whether before or after judgment—converts him into a state actor. Since that makes the Anti-Injunction Act inapplicable and since, under the ruling below, *Younger* is also inapplicable, the door is open to wide-scale evasions of this Court's comity rulings. Thus every litigant in state court is given a fielder's choice as to whether to pursue his remedies directly in the state's judicial system, with review

19. Nor can the rule propounded by the Second Circuit be confined in any principled way to litigation resulting in money judgments. The minimal principle for which the judgment below must stand is that federal relief is available under § 1983 whenever the losing party in state court civil litigation is accorded a right to appeal but is prevented, by a combination of state law and unavoidable circumstance, from staying execution of an adverse judgment pending appeal—provided such execution may cause "irreversible destruction" of some interest of the losing party (A50). But such irreversibility may be claimed whenever appellate victory could not wholly undo the consequences of a judgment's execution. Thus, in ordinary family disputes resulting in visitation decrees or custody awards, in various contract or property disputes ending in awards of specific performance with respect to some unique item, and in myriad tort cases leading to judgments granting equitable relief, the losing party may readily claim, just as Texaco did here, that the right of appeal provided by the state is irrationally fettered and unfairly rendered futile unless the state makes it possible for the loser to stay enforcement of the judgment pending appeal.

in this Court once state avenues have been exhausted, or to commence a collateral federal action under rules that reward deliberate bypass of the state's judicial system.

CONCLUSION

In its haste to provide immediate and unprecedented relief to Texaco notwithstanding the availability of the Texas state courts and this Court under § 1257 as forums where Texaco could present its constitutional claims in an orderly fashion, the Second Circuit has fundamentally altered the jurisdictional landscape. Weakened by the inconsistent and dubious exceptions pioneered by the court below, the Anti-Injunction Act, *Younger* abstention, and the *Rooker-Feldman* doctrine no longer clearly define the boundaries of the federal and state judicial systems. Dissatisfied state court litigants are free to roam across jurisdictional borders, disregarding comity and manipulating federal tribunals into supplanting state courts and state policies and supervising state procedures in pending state litigation. The logic that generated this federal intervention admits of no limiting principles and can be contained only by the most arbitrary of parameters. For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

(*continued on next page*)

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

May 1, 1986

TABLE OF CONTENTS

PAGE

APPENDIX A
Opinion of United States Court of Appeals for the Second Circuit, dated February 20, 1986 ..... A1

APPENDIX B
Order of United States District Court for the Southern District of New York, dated January 16, 1986..... A52

APPENDIX C
Amended Order after remand of United States District Court for the Southern District of New York, dated April 8, 1986 ..... A54

APPENDIX D
Opinion of United States District Court for the Southern District of New York, dated January 10, 1986..... A56

APPENDIX E
Supplemental Findings of Fact of United States District Court for the Southern District of New York, dated January 10, 1986 ..... A79

APPENDIX F
Judgment of United States Court of Appeals for the Second Circuit, dated February 20, 1986 ..... A118

APPENDIX G
Order of United States Court of Appeals for the Second Circuit Denying Motion for Recall of Mandate/Clarification, Modification or Partial Stay of Judgment, dated March 27, 1986..... A120

PAGE

APPENDIX H
Notice of Appeal to this Court, filed March 21, 1986 A121

APPENDIX I
Judgment of District Court of Harris County, Texas, 151st Judicial District, dated December 10, 1985.... A123

APPENDIX J
Pennzoil Stipulation, dated December 20, 1985..... A129

APPENDIX K
Article 1, Section 13 of the Texas Constitution (in part) A131

APPENDIX L
Title 42, Section 1983 of the United States Code A132

APPENDIX M
Title 28, Section 1257 of the United States Code A133

APPENDIX N
Section 22.002(a) of the Texas Government Code.... A134

APPENDIX O
Rule 62 of the Federal Rules of Civil Procedure..... A135

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 883, 884—August Term 1985

Argued: February 11, 1986 Decided: February 20, 1986

Docket Nos. 86-7046, 86-7052

TEXACO INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

Before:

LUMBARD, MANSFIELD and PIERCE,

Circuit Judges.

Appeal by Pennzoil Company from an order of the Southern District of New York, Brieant, *Judge*, granting

to Texaco Inc. a preliminary injunction restraining Pennzoil from enforcing a Texas state court money judgment in the sum of $11.12 billion pending appeals to the Texas appellate courts and the United States Supreme Court. The injunction was issued on the grounds that enforcement of the Texas judgment pending appeal would violate Texaco's constitutional and federal statutory rights.

Affirmed in part and reversed in part.

ARTHUR L. LIMAN, New York, NY, and LAURENCE H. TRIBE, Cambridge, MA (Mark A. Belnick, Gerard E. Harper, Brad S. Karp, Stephen M. Merkel, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY; John L. Jeffers, Jr., G. Irvin Terrell, Baker & Botts, Houston, TX; Paul M. Bator, Mayer, Brown & Platt, Chicago, IL, of counsel), *for Appellant Pennzoil Company.*

DAVID BOIES, New York, NY, and PAUL J. CURRAN, New York, NY (Thomas D. Barr, Max R. Shulman, Francis P. Barron, Stephen S. Madsen, William F. Duker, Stephen D. Poss, Robert B. Silver, Rosemary Q. Barry, Richard L. Crisona, Nicholas A. Gravante, Jr., Linda C. McClain, Dominic Surprenant, Cravath, Swaine & Moore, New York, NY; Milton J. Schubin, Randolph S. Sherman, Ira S. Sacks, David R. Garcia,

J. Clark Kelso, Kaye, Scholer, Fierman, Hays & Handler, New York, NY, of counsel), *for Appellee Texaco Inc.*

JIM MATTOX, Attorney General, State of Texas, Austin, TX (Mary F. Keller, Executive Assistant, J. Patrick Wiseman, Assistant Attorney General, W. Robert Gray, Assistant Attorney General, of counsel), *for Intervenor State of Texas.*

Amici briefs have been received from the following:

State of Alabama
State of Alaska
State of California
State of Delaware
State of Florida
State of Kansas
State of Montana
NAACP
State of New Mexico
State of New York
U.S. Senator Alfonse M. D'Amato
Rep. Hamilton Fish, Jr. and 24 Other Members of U.S. Congress from New York
The Business Council of New York
State of Oklahoma
Attorney General of State of Oklahoma
Hon. Jack Brooks and 12 Other Members of U.S. Congress from Texas
State of Washington
State of Wyoming

Henry Fowler, W. Michael Blumenthal, G. William Miller and William E. Simon, former Secretaries of the U.S. Treasury

The Committee of Concerned Employees and Retirees (Stockholders) of Texaco Inc.

MANSFIELD, *Circuit Judge*:

Pennzoil Company ("Pennzoil"), a Delaware corporation with its principal place of business in Texas, appeals an order of the Southern District of New York, Brieant, *Judge*, granting to Texaco Inc. ("Texaco"), a Delaware corporation based in New York, a preliminary injunction restraining Pennzoil from seeking to enforce a judgment entered on December 10, 1985, by the Texas state court for the 151st Judicial District in the sum of $11.12 billion (including punitive damages, pre-judgment interest and costs) in Pennzoil's favor against Texaco.[1] The Texas judgment, handed down after a four-and-one-half month jury trial, was based on the jury's findings with respect to special issues propounded by the court.

In substance the jury found that Texaco had knowingly and intentionally interfered with a pending agreement between Getty Oil Co. ("Getty") and Pennzoil, which was negotiated in New York, for the latter's acquisition of approximately 3/7ths of Getty's outstanding shares at $110.00 per share plus certain additional consideration

---

1 Upon the district judge's invitation the State of Texas intervened as a party pursuant to 28 U.S.C. § 2403(b) and has also appealed.

and that Pennzoil was entitled to $7.53 billion compensatory damages and $3 billion punitive damages. The stock was eventually sold by Getty to Texaco at a higher price ($128 per share) than that found to have been agreed upon between Getty and Pennzoil.

The present action was commenced by Texaco's filing of its complaint in the Southern District of New York on December 10, 1985. The complaint set forth seven claims (described *infra* at pp. 9-10) alleging that the Texas judgment and enforcement of it through use of Texas lien and supersedeas bond provisions (described *infra* at pp. 6-7) would violate its rights under the Commerce, Supremacy, Full Faith and Credit, Due Process and Equal Protection Clauses of our federal Constitution, as well as under the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Securities Exchange Act of 1934, 15 U.S.C. § 78, and Rules promulgated by the S.E.C. under the latter Act.

We hold that the district court had jurisdiction over the Third and Sixth Claims of Texaco's Amended Complaint (due process and equal protection) in the present action and that the grant of preliminary injunctive relief based on them does not represent an abuse of judicial discretion since it is supported by undisputed facts that satisfy well-established standards for preliminary injunctive relief. However, all other claims asserted in Texaco's complaint must be dismissed for lack of subject matter jurisdiction since they seek appellate review on the merits of the Texas judgment in violation of 28 U.S.C. § 1257 as interpreted by the United States Supreme Court.[2] *See*

---

2 28 U.S.C. § 1257 provides in pertinent part:

"§ 1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a

(Footnote continued on following page)

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The injunctive relief issued by the district court on the Third and Sixth Claims of the Amended Complaint is affirmed. The case is remanded with directions to dismiss the First, Second, Fourth, Fifth and Seventh Claims.

The principal issues in the Texas case were whether Getty had entered into an agreement with Pennzoil, whether Texaco had according to the law of New York tortiously interfered with that contract, and, if so, what damages were suffered by Pennzoil as a result of Texaco's conduct. Following the jury's special findings in Pennzoil's favor on these issues the Texas trial judge, Hon. Solomon Casseb, denied Texaco's motion for judgment n.o.v., which was sought on various grounds, including all of those alleged in the present federal action except those alleged in the Third and Sixth Claims. On December 10, 1985, Judge Casseb entered judgment in favor of Pennzoil against Texaco in the sum of $7.53 billion compensatory damages, $3 billion punitive damages and $624,753,662 prejudgment interest to December 9, 1985, from which $33,777,551.17 was subtracted according to a stipulation filed by Pennzoil. The judgment totalled $11,120,976,110.83 and provided that post-judgment in-

---

(Footnote continued from previous page)

> State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

terest would be recoverable by Pennzoil at the rate of 10% per annum until the judgment was paid. Texaco's motion for a new trial remains pending before Judge Casseb.

With the consent of the parties, Par. 7 of the judgment, in order to preserve the status quo as long as the trial court had jurisdiction of the case, prohibited Pennzoil, during the pendency of the proceeding before the trial judge, from seeking to enforce the judgment and barred Texaco from encumbering its assets except "in the routine and ordinary course of business". The purpose of Par. 7 was to avoid the possible collapse and liquidation or bankruptcy of Texaco that might be precipitated by the sudden financial crisis it faced as a result of the astronomical amount awarded against it. However, this relief would be short-lived since it would expire when the Texas trial court lost jurisdiction over the case, which could occur as early as 30 days after the trial judge's denial of Texaco's motion for a new trial and at the latest on March 25, 1986.[3] Thus, Texaco could anticipate that if

---

3 If the Texas trial court denies Texaco's motion for a new trial, it will, under Tex. R. Civ. P. 329(b), retain jurisdiction over the case for, at most, 105 days after December 10, 1985 (the date the trial court signed the judgment). Its jurisdiction would therefore terminate on March 25, 1986. Under Tex. R. Civ. P. 329(b)(a) a party may move for a new trial within 30 days after the judgment complained of has been signed. Texaco complied with this procedure.

Under Tex. R. Civ. P. 329(b)(c) the trial judge then has 75 days from the day he signed the judgment in which to rule on the motion. If he does not rule within that period, i.e., by February 23, 1986, the motion will be denied by operation of law. Regardless of the means by which the motion is denied, the judge retains jurisdiction over the case for 30 days after its denial. Tex. R. Civ. P. 329(b)(e). After the 30-day period, however, the trial court's plenary jurisdiction ceases. Tex. R. Civ. P. 329(b)(f).

Accordingly if Judge Casseb denies the motion before February 23, he will retain jurisdiction over the case for 30 days thereafter. If he does not rule on the motion, Texas law will consider it to have been

Judge Casseb denied the motion on the same day it was filed, January 9, 1986 (as he did with respect to the motion for judgment n.o.v.) Par. 7 would expire by February 10, 1986.

Upon the expiration of Par. 7 of the Texas judgment, Texaco would, absent injunctive relief, again face a financial crisis of staggering proportions, which could not under Texas law be avoided without Pennzoil's consent. Rule 364 of the Texas Rules of Civil Procedure requires Texaco, in order to stay execution of the judgment against it pending its appeal, to post a supersedeas bond, payable to Pennzoil, "in at least the amount of judgment, interest and costs,"[4] or more than $12 billion since interest accumulates at the rate of approximately $3 million per day. In addition, Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983), provides that an abstract of judgment presented by the judgment creditor (Pennzoil), when properly recorded and indexed, constitutes a lien "on the property of the defendant located in the county in which

---

denied on February 23. The court will then retain jurisdiction for 30 more days, i.e., until March 25.

4 Tex. R. Civ. P. 364 provides in part:

"Rule 364. Supersedeas Bond or Deposit

"(a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.

"(b) Money Judgment. When the judgment awards recover of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs."

the abstract was recorded and indexed . . .". *Id.* § 52.001. Texaco's real property in the State of Texas is estimated to be worth $5 billion.

Needless to say, Texaco could not possibly meet the mandatory bond requirement. It is estimated that the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances. In addition, full collateralization would be required for a bond of such huge proportions. Texaco does not have sufficient liquid or immediately-liquidatable assets to post $12 billion in cash or cash equivalents and still retain sufficient liquid assets to operate its business. Moreover, it would be unable, because of the terms of its unsubordinated debt securities, to borrow $12 billion by mortgaging or pledging its assets. A lien of such proportions would seriously impair its ability to carry on its business with the result that it would probably be forced into bankruptcy or liquidation.

Under Texas law, relief from the harsh strictures of Rule 364 is not immediately available to Texaco. The Rule's terms have repeatedly been declared by Texas courts to be mandatory, requiring that the supersedeas bond be in at least the amount of the judgment, interest and costs and prohibiting the requirement from being partially superseded. *Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. Civ. App. 1983); *Kennesaw Life & Accident Ins. Co. v. Streetman*, 644 S.W.2d 915, 917 (Tex. Civ. App. 1983); *Haney Elec. Co. v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App. 1980); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App. 1979); *Schrader v. Garcia*, 512 S.W.2d 830, 831 (Tex. Civ. App. 1974). This interpretation has been adopted by the Texas Sub-

committee on Interpretation of Rules, 4 Tex. Civ. Code Ann., pp. 159-60 (Vernon 1985). Although Texaco could mount an attack in the Texas courts on the Rule, by motion and mandamus, on the ground that it is unconstitutional as applied in this case, the likelihood of obtaining a definitive constitutional ruling in the short period of time available to it appears extremely slim, at least without full cooperation on the part of Pennzoil. In the meantime Pennzoil, upon expiration of Par. 7 of the judgment, would have the right to execute its judgment, rendering even a favorable Texas court constitutional ruling "too little, too late".

Immediately following entry of the Texas judgment on December 10, 1985, Texaco, because of uncertainties regarding the meaning and effect of Par. 7 and the knowledge that it would shortly expire when the trial court lost jurisdiction, faced a serious crisis. Its bonds were downgraded and its credit lines shrank. Unsecured borrowing became unavailable and even secured financing uncertain. Suppliers, joint venturers, and purchasers of Texaco assets shied away from dealing with it, in part because many of those dealings would of necessity involve commitments beyond March 25, 1986, the last date when Par. 7 would be effective. An effort by Texaco on December 13, 1985, to obtain a hearing from the Texas trial court to consider modification of Par. 7 failed when Pennzoil would not agree to meet on dates specified by the court (Dec. 16, 17 or 18) and no alternative dates were made available.

On December 17, 1985, Texaco moved by order to show cause in the Southern District of New York, where Texaco has its principal place of business and personal jurisdiction over Pennzoil could be obtained, for a tem-

porary restraining order and preliminary injunction against Pennzoil's taking any action to enforce the Texas judgment. The Amended Complaint alleged (1) that the Texas judgment excessively burdened interstate commerce in violation of the Commerce Clause and frustrated the purposes of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)(f), by deterring competitive tender offers after a target company (in this case Getty) and a given bidder (Pennzoil) had conducted negotiations (First and Second Claims[5]); (2) that the Texas lien and supersedeas bond provisions, by preventing Texaco from effectively prosecuting appeals to the Texas Court of Civil Appeals, the Texas Supreme Court, and eventually to the United States Supreme Court under 28 U.S.C. § 1257(2), were void under the Supremacy, Due Process and Equal Protection Clauses of the United States Constitution (Third and Sixth Claims); (3) that the Texas judgment permitted Pennzoil to engage in unlawful conduct in violation of the Securities Exchange Act, 15 U.S.C. § 78j, 78m, 78n and Rule 10b-13 thereunder, 17 C.F.R. § 240.10b-13, namely, the purchase of Getty stock other than pursuant to Pennzoil's outstanding tender offer (Fourth Claim); (4) that the judgment violated the Full Faith and Credit Clause by disregarding the substantive law of New York, which the parties agreed governed (Fifth Claim); and (5) that the judgment was the product of fundamental unfairness in violation of the Due Process Clause (Seventh Claim).

Pending a hearing on Texaco's motion, Judge Brieant on December 17, 1985, issued a temporary restraining

---

5 Although Texaco labels each claim as a "cause of action", we prefer to use the term "claim", in accordance with the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 8.

order. On December 20, 1985, Pennzoil cross-moved for dissolution of the restraining order and dismissal of the complaint for lack of jurisdiction and failure to state a claim. On the same date Pennzoil tendered to Texaco for filing in the Texas action a "stipulation" under which the Texas trial judge's power to issue a stay in that proceeding would be governed by the same supersedeas bond provisions as those governing federal actions under Fed. R. Civ. P. 62. The offer, which was renewed upon argument of this appeal, has not been accepted by the Texas trial judge or by Texaco.

Both sides having waived the taking of oral testimony, the district court on January 10, 1986, filed its findings and conclusions in an opinion granting Texaco's application for preliminary relief and denying Pennzoil's cross-motion. The district court found that absent injunctive relief Texaco would, pending appeal from the Texas judgment, suffer irreparable injury from enforcement of the Texas supersedeas bond and lien provisions since it would be unable to post a bond in the sum of approximately $12 billion required by Tex. R. Civ. P. 364(b) or continue to conduct business operations while subject to liens under Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983), with the result that it would probably be forced into bankruptcy or liquidation. The result would be catastrophic for thousands of Texaco employees, stockholders and suppliers located throughout the United States and world-wide and would threaten serious harm to the national economy and the public.

The district court next concluded that Texaco's appeal of the Texas judgment stood a substantial likelihood of success, at least in reducing the award of $11.12 billion damages. It reasoned that the impropriety of awarding

punitive damages would be "quite obvious" to a Texas reviewing court and that the award had a "negative impact" on the federal policy expressed in the Securities Exchange Act of insuring that stockholders (in this case of Getty) derive the benefit of the best tender offer price. Using market prices of Getty stock as an indicator, the district court reasoned that, assuming the validity of the Texas jury's finding of tortious interference with the Getty-Pennzoil contract, the compensatory damages to Pennzoil "should in no event exceed $800 Million" if Pennzoil's bargain included the ultimate opportunity to control Getty.

Turning to the claims asserted by Texaco in the present federal suit, the district court, after using a balancing of interests test derived from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), concluded that Texaco's claim that the Texas bonding and lien provisions violated its Due Process and Equal Protection rights had a clear probability of success. The district court further held, on the basis of the Supreme Court's recent decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ____ U.S. ____, 105 S. Ct. 1327 (1985), that enforcement of Texaco's federal securities law claims would not be precluded by the Texas judgment and that since federal courts had exclusive jurisdiction over them, 15 U.S.C. § 78aa, they would survive regardless of the ultimate outcome of the Texas suit. In so holding, the court cited the Supreme Court's decision in *Rooker, supra*, but did not discuss its applicability or that of 28 U.S.C. § 1257 to any of Texaco's claims in the present federal action.

The district court also refused Pennzoil's request that the court deny injunctive relief on grounds of federalism and comity. The federal Anti-Injunction Statute, 28

U.S.C. § 2283, was held inapplicable for the reason that actions under the Civil Rights Act, 42 U.S.C. § 1983, such as the present one, are expressly excepted from its application. *Mitchum v. Foster*, 407 U.S. 225 (1972). On the question of whether the present complaint stated a valid claim for relief under 42 U.S.C. § 1983, the district court followed the Fifth Circuit's decision in *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), in which that court in a § 1983 action upheld a preliminary injunction against private enforcement of a state court tort judgment pending appeal on the ground, among others, that application of a state supersedeas bond requirement would violate the plaintiff's federal constitutional rights.

Abstention under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), was denied on the ground that no impairment of a vital state interest was shown. The court reasoned that an injunction would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided. Abstention under the principle of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), was denied on the ground that, since the Texas bond and lien provisions were clear and mandatory, the constitutional issues could not be avoided by a state court interpretation of them.

In order to protect Pennzoil against Texaco's transferring or encumbering assets that would otherwise be available to Pennzoil if an appeal of the Texas judgment should end in Pennzoil's favor, the district court's January 16, 1986, order required Texaco as a condition of injunctive relief to post security in the sum of $1 billion subject to the proviso that additional security might be

required after further hearing. The $1 billion figure was arrived at on the basis of the district court's determination that, at most, Pennzoil's compensatory damages in the Texas action should amount to $800 million, to which the court added $200 million for interest, costs and attorney's fees. On February 5, 1986, Texaco posted security in the sum of $1 billion.

DISCUSSION

The Existence of Federal Jurisdiction

The threshold questions are (1) whether federal jurisdiction exists that would permit a federal court to rule on Texaco's constitutional and federal law claims, and, if so, (2) whether the district court should, in the interests of comity and federalism, have abstained from exercising that jurisdiction in order to permit Texas courts to rule on those claims.

Pennzoil, relying on the Supreme Court's decisions in *District of Columbia Court of Appeals v. Feldman*, *supra*, *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, *supra*, and *Rooker v. Fidelity Trust Co.*, *supra*, argues that the only courts empowered to entertain claims of constitutional error in a Texas state court judgment are the Texas appellate courts and the Supreme Court of the United States. Texas law guarantees a right to review by its appellate courts of lower state court decisions. *Texas State Constitution*, Art. I, §§ 13 and 19; *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ. App. 1931). Title 28 U.S.C. § 1257(2), in turn, grants to the United States Supreme Court appellate review of state court judgments. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975); *Cohen v. California*, 403 U.S. 15, 18 (1971).

In *Rooker* the Supreme Court, in refusing to permit a losing state court litigant to invoke federal jurisdiction to attack a state court judgment on the ground that it had unconstitutionally misapplied state law, held that an appeal through the state courts to the Supreme Court constituted the exclusive procedure by which the judgment might be reviewed for constitutional error and that under the predecessor of § 1257 (Judicial Code, § 237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726),

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction." *Rooker, supra*, 263 U.S. at 415-16.

The *Rooker* doctrine has been reaffirmed by the Supreme Court. In *Atlantic Coast Line R. Co., supra*, 398 U.S. at 296, the Court stated:

> "Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If [the party seeking the injunction] was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the [state] appellate courts and ultimately, if necessary, in this Court."

In *Feldman*, *supra*, 460 U.S. at 476, the Court once again recognized the viability of *Rooker*, stating:

> "The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257."

In short, an inferior federal court established by Congress pursuant to Art. III, § 1, of the Constitution may not act as an appellate tribunal for the purpose of overruling a state court judgment, even though the judgment may rest on an erroneous resolution of constitutional or federal law issues. The exclusive procedure for federal review is that specified by 28 U.S.C. § 1257.[6]

The rationale behind the *Rooker-Feldman* principle is clear and sound. In this nation we have two "essentially separate legal systems." *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 286. "[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and 'to prevent needless friction between state and federal courts,' *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9 (1940), it was necessary to work out lines of demarcation between the two systems." *Id.*

Texaco contends that the *Rooker-Feldman* doctrine does not apply to collateral federal attacks on state

---

6 The habeas corpus jurisdiction of the lower federal courts is a constitutionally authorized exception to the principle of *Rooker-Feldman*. *See Sumner v. Mata*, 449 U.S. 539, 543-44 (1981) ("even a single federal judge may overturn the judgment of the highest court of a State" in adjudicating a petition for habeas corpus relief).

judgments that have not attained appellate finality. We disagree and know of no decision so holding. Indeed, courts, including the Supreme Court, have not hesitated to apply the *Rooker-Feldman* doctrine to judgments which Texaco would label as "non-final". *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 296 (remedy for party adversely affected by lower state court judgment was to appeal to the state appellate courts, not to seek a federal injunction). *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 3531 (1985); *Community Action Group v. City of Columbus*, 473 F.2d 966, 973 (5th Cir. 1973); *Pilkinton v. Pilkinton*, 389 F.2d 32, 33 (8th Cir.), *cert. denied*, 392 U.S. 906 (1968).

Although the state judgments in *Rooker* and *Feldman* had survived appeal in the state court system, that fact was not advanced by the Supreme Court as a basis for, or as a condition to, its decisions. Rather the doctrine stems from recognition that (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions, *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Huffman*, *supra*, 420 U.S. at 610-11, (2) a path is available through the state appellate system to the Supreme Court, and that (3) waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal district court intervened to overrule a state court decision. *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 286. Allowing lower federal courts to review the judgments of state lower courts is as intrusive and as likely to breed antagonism between state and federal systems as allowing federal court review of the judgments of the states' highest courts. Indeed, if *Rooker-Feldman* only barred federal review of judgments

which had been fully appealed through the state system, it would foster federal/state rivalry by creating incentives for disappointed state court appellants to forum-shop, jumping over to federal courts instead of appealing their cases to the states' highest tribunals. Once a litigant has received an adverse adjudication on a constitutional issue from the state court, the state adjudication is just as final for the purpose of applying the *Rooker-Feldman* doctrine as it would be for purposes of appeal.

Applying the foregoing principles, we are satisfied that the *Rooker-Feldman* doctrine was clearly violated by much of the district court's decision. Many of the judge's conclusions with respect to the merits of the Texas action, despite his lip-service disclaimer, constitute what amounts to an impermissible appellate review of issues that have already been adjudicated by the Texas trial court. These include his statements to the effect (1) that an award of punitive damages in the Texas action was improper, which a "reviewing court in Texas will find . . . quite obvious," (2) that the $3 billion punitive damage award violates the policy expressed in federal securities laws, over which the federal court has exclusive jurisdiction, (3) that the Texas award of $7.53 billion was "absurd", and (4) that the compensatory damage award in the Texas action "should in no event exceed $800 Million". The proper fora for appellate review of these matters are the Texas appellate courts and eventually the Supreme Court of the United States. Moreover, the district court violated the *Rooker-Feldman* doctrine in holding that it had jurisdiction over all constitutional and federal statutory claims asserted by Texaco and that it would retain jurisdiction of them pending appeal through the Texas courts. Each of Texaco's constitutional and federal claims except those stated

by it in its Third and Sixth Claims were raised by it as defenses in the Texas lawsuit and adjudicated against it.[7] The review-ability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them.[8]

---

[7] Texaco raised its due process challenges to the trial itself in its motion to recuse Judge Farris, the Judge who presided over three-fourths of the case, and in its motion for a mistrial. It raised each of its other federal claims, except the due process and equal protection challenges to the Texas bond and lien provisions, in its memorandum in support of its motion for judgment notwithstanding the verdict. That document's Table of Contents reads:

"IV. EVEN IF PENNZOIL DID ENTER INTO A CONTRACT, IT WAS VOID AND UNENFORCEABLE; IT CANNOT, THEREFORE, BE USED AS A PREDICATE FOR A TORTIOUS INTERFERENCE CLAIM

A. THE ALLEGED CONTRACT WOULD HAVE VIOLATED SEC RULE 10b-13

* * * * *

"IX. TEXACO IS ENTITLED TO JUDGMENT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW

A. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE COMMERCE CLAUSE

B. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE SUPREMACY CLAUSE

C. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE FULL FAITH AND CREDIT CLAUSE

D. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE EQUAL PROTECTION CLAUSE

E. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE TAKINGS CLAUSE

F. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE DUE PROCESS CLAUSE"

[8] The district court held that Texaco's claims under the Securities and Exchange Act of 1934 are not barred by *res judicata* because they are matters of exclusive federal jurisdiction. 15 U.S.C. § 78aa. The court relied on *Marrese v. American Academy of Orthopaedic Surgeons*, ___ U.S. ___ 105 S. Ct. 1327 (1985), for the proposition that a statutory grant of exclusive jurisdiction may create an exception to the general rule that decisions of state courts be accorded full faith and credit by federal courts. 28 U.S.C. § 1738. The court concluded that 15

Texaco's Third and Sixth Claims stand on a different footing from its other asserted grounds of relief—they were not presented to the state trial court. Although a state court judgment has claim-preclusive effect in federal court, *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980), Pennzoil does not contend that that rule bars Texaco's claims here. Rather, Pennzoil contends that Texaco's claims are barred because *Rooker-Feldman* should be read broadly to preclude federal review of issues which a party could have raised in the state court proceeding, but chose to withhold from the state court. We disagree.

Aside from the absence of any support for Pennzoil's theory in any decision applying *Rooker-Feldman*, the theory would read 28 U.S.C. § 1257 to severely impair, perhaps negate, a litigant's right to gain equitable or other relief under 42 U.S.C. § 1983, *Mitchum v. Foster*, 407 U.S. 225 (1972), since most claims under § 1983, especially requests to enjoin ongoing state proceedings, could be raised in a related state proceeding. To relegate the § 1983 claimant in such cases to the state court would ignore Congress' purpose in adopting that statute. Section 1983 was intended "to provide dual or concurrent

---

U.S.C. § 78aa is such an exception and that the Texas court's rejection of Texaco's defenses based on federal securities laws were therefore not binding on a federal court. This was error.

In *Murphy v. Gallagher*, 761 F.2d 878 (2d Cir. 1985), we held that 15 U.S.C. § 78aa does not create an exception to the general requirement of full faith and credit. Since federal law does not bar state courts from exercising jurisdiction over defenses based on the Securities and Exchange Act of 1934, *see, e.g.*, *Will v. Calvert Fire Ins.*, 437 U.S. 655 (1978); *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 822 (9th Cir. 1975); *Shareholders Management v. Gregory*, 449 F.2d 326, 327 (9th Cir. 1971); *Aetna State Bank v. Altheimer*, 430 F.2d 750, 754 (7th Cir. 1970), state court determinations relating to those issues are binding on subsequent federal court proceedings to the extent required by 28 U.S.C. § 1738.

forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 506 (1982). *See also Allen v. McCurry, supra*, 449 U.S. at 99. Accordingly, it is settled law that a § 1983 litigant need not first seek to vindicate his federal claims in state court before turning to a federal court for relief. *Patsy, supra*; *Board of Regents v. Tomanino*, 446 U.S. 478, 491 (1980); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Indeed, the Court has recognized, in the context of criminal proceedings, that a litigant who is not collaterally estopped from raising a § 1983 claim, is not precluded from raising the same claim simply because he had an opportunity to raise it in an earlier state proceeding. *Haring v. Prosise*, 462 U.S. 306, 318-23 (1983). Application of these principles is appropriate here because Texaco did not choose the Texas state court for resolution of the claims between the parties but was summoned into that court by Pennzoil. Texaco was not, therefore, engaged in forum-shopping when it sought relief under § 1983 in the Southern District of New York.

In accordance with the foregoing, we hold that the district court is barred by the *Rooker-Feldman* doctrine from exercising jurisdiction over the First, Second, Fourth, Fifth and Seventh Claims of Texaco's complaint and that they must be dismissed for lack of subject matter jurisdiction. *Rooker*, however, does not bar a federal court from exercising jurisdiction over the Third and Sixth Claims, which allege that the Texas automatic and mandatory lien and supersedeas bond provisions deny Texaco due process and equal protection as applied. Those claims have never been presented to or adjudicated by a state court. Nor are they "inextricably intertwined"

with the barred claims. *Feldman*, *supra*, 460 U.S. at 482-83 n.16. Aside from the fact that our adjudication of the Third and Sixth Claims is not a collateral attack on the merits of the Texas judgment, Texaco, which did not choose the Texas state court forum, does not have a fair opportunity to seek and obtain a timely final resolution of those claims from the Texas courts and the Supreme Court before it will suffer irreparable harm because of the Texas lien and bonding provisions. See p. 35, *infra*. *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). Our decision, therefore, does not displace any state court adjudication or offend basic principles of comity and federalism.

Whether the Complaint States a § 1983 Claim, Including State Action

The next question is whether the Third and Sixth Claims, as illuminated by the affidavits of both sides with respect to the need for preliminary relief, state the essential elements of an action under § 1983. That statute was intended to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Patsy*, *supra*, 457 U.S. at 503 (quoting *Mitchum*, *supra*, 407 U.S. at 242). In order to maintain a § 1983 claim, however, a litigant must allege and show deprivation (1) of a right "secured by the Constitution and laws of the United States", (2) by a defendant acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

The first element of a § 1983 action—threatened deprivation of a constitutional right—is adequately alleged in the complaint and supported by the parties' affidavits.

The undisputed facts indicate that the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility. This would at least amount to a deprivation of its property in violation of its right to due process under the Constitution. *Evitts v. Lucey*, ____ U.S. ____, 105 S. Ct. 830, 840 (1985).[9]

The presence of the second essential element of a § 1983 action is more difficult to resolve. The Supreme Court has enunciated a two-step test for determining whether conduct resulting in the deprivation of a federal right is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

> "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

Texaco has satisfied the first prong of this test since Texas state law provides for enforcement of the judgment unless Texaco posts a supersedeas bond in the full amount of the judgment. Tex. R. Civ. P. 364(b), *supra*. Pennzoil contends, however, that it cannot fairly be termed a "state

---

9 We discuss Texaco's due process claim more fully *infra* at 43-45.

actor" and that the suit therefore fails to meet the second prong of the test. Resolution of this issue calls for a factual inquiry into the relationship between Pennzoil and the State of Texas that would result from Pennzoil's enforcement of the judgment. *See Lugar, supra*, at 939 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)).

To enforce the judgment, Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets. A judgment creditor must first obtain a writ of execution, which is "a process of the court from which it is issued." Tex. R. Civ. P. 622. The writ is "directed to any sheriff or any constable within the State of Texas" and must be signed by the clerk or justice and bear the seal of the court. Tex. R. Civ. P. 629. Furthermore, the writ "shall require the officer to execute according to its terms." *Id.* Finally, when, as here, the judgment requires payment of money, the writ "must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law." Tex. R. Civ. P. 630. When the sheriff or constable receives the writ, Texas law commands that "he shall proceed without delay to levy the same upon the property of the defendant". Tex. R. Civ. P. 637. Property levied upon pursuant to the writ of execution may ultimately be seized by the officer and liquidated to satisfy the judgment. Tex. R. Civ. P. 646a, 649.

In addition, Texas law authorizes the placement of judgment liens upon Texaco's property in the state immediately upon entry of judgment. Tex. Prop. Code Ann. § 52.001. Such liens are acquired by requesting state officials to undertake a series of acts. Pennzoil must obtain a certified abstract of the judgment from the clerk

of the court which rendered judgment. *Id.* § 52.002. The abstract must contain certain information required by law. *Id.* § 52.003. The county clerk must then record the abstract in the county judgment record and enter it in the index to the record. *Id.* § 52.004.

Enforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of § 1983. In *Lugar v. Edmondson Oil Co.* the Supreme Court concluded that a private party who invoked Virginia's prejudgment attachment procedure acted jointly with the state. *Lugar, supra*, 457 U.S. at 942. The Virginia prejudgment attachment procedure, like the Texas procedure at issue here, provided that a private party could obtain a writ from the clerk of the state court and have the writ executed by a county sheriff. *Id.* at 924-25. Under the Virginia law, the sheriff was only empowered to attach the property, while its owner retained possession. The Texas procedure, however, goes further and permits seizure by a Texas sheriff of attached property. We conclude, as the Supreme Court did in *Lugar*, that the "private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment" and § 1983. *Id.* at 933.

A different result is not compelled by the fact that *Lugar* involved a prejudgment attachment whereas the attachment here would be pursuant to a court judgment. The presence of a court judgment does not alter the fact that Texas state officials execute the judgment only at Pennzoil's behest. Pennzoil cannot be divorced from that execution procedure merely because a court authorized execution of the judgment. Indeed, to so hold would

preclude the victim from obtaining relief against the party who must act jointly with the state official to unleash the unconstitutional state government action. To limit the *Lugar* rationale to prejudgment attachments would violate the precept that § 1983 provides a remedy "as broad as the protection of the Fourteenth Amendment affords the individual". *Lugar, supra*, at 934.

Our ruling in *Dieffenbach v. Attorney General of Vermont*, 604 F.2d 187 (2d Cir. 1979), supports the conclusion that a party acting pursuant to a state court judgment is not necessarily insulated from the reach of § 1983. In *Dieffenbach* we found that a bank was subject to suit under § 1983 when it utilized an allegedly unconstitutional foreclosure procedure to enforce a judgment against a mortgagor. We noted that in order to execute the judgment the bank was required to obtain a decree of foreclosure and that possession could only be gained by obtaining a writ from the clerk of the court which must be executed by a sheriff. *Id.* at 194 and n.12.

Finally, we note that Texaco's challenge to the state bond and lien provisions does not call into question the validity of the underlying judgment. Thus this is not a case where a private party is alleged to be a state actor merely because it brought suit and sought a judicial ruling. *See Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *cf. Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985) (party who seeks temporary restraining order is not joint actor with judge who issues the order); *Dahlberg v. Becker*, 748 F.2d 85, 92-93 (2d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1845 (1985) (private party did not act jointly with state when she misused lawful state procedure and judge inadvertently issued contempt order). In such a case the independent judgment of the state

judiciary is called into play, and unless unusual circumstances are shown, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162-71 (1970); *cf. United States v. Price*, 383 U.S. 787, 794-96 (1966) (18 U.S.C. § 242), a private party cannot be charged with responsibility for a judicial decision. Rather, Texaco claims that the state enforcement procedures are unconstitutional as applied. Since Texas law directs state officials to do Pennzoil's bidding in executing the judgment, it is the decision of Pennzoil, not that of the state judiciary, to utilize state agents to undertake the collection process, and the state officials can act only upon Pennzoil's unilateral determination. *Lugar, supra*, 457 U.S. at 941.

The facts of this case, therefore, compel the conclusion that in enforcing the Texas state court judgment, Pennzoil must, of necessity, act jointly with the state of Texas.

Having concluded that federal jurisdiction exists over the § 1983 claims asserted in Texaco's Third and Sixth Claims, we need not tarry over Pennzoil's argument that injunctive relief against enforcement of the Texas action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from enjoining state judicial proceedings "except as expressly authorized by Act of Congress".[10] Since an action under § 1983 constitutes just such an exception, *Mitchum, supra*, § 2283 does not bar Texaco's claims.

---

10 28 U.S.C. § 2283 reads:

"§ 2283. Stay of State court proceedings

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Whether Abstention from Exercise of Federal Jurisdiction is Required

There remains the question of whether federal jurisdiction over the § 1983 claims must be exercised or whether we should refrain from doing so under the doctrine of "abstention". In certain circumstances, concern for federalism, comity, and judicial economy suggests that federal courts abstain from entertaining § 1983 cases. Abstention, however, is the exception, not the rule. *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 104 S. Ct. 2321, 2327 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 15 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, *rehearing denied*, 426 U.S. 912 (1976). It is appropriate in only four relatively well-defined circumstances. *Moses H. Cone*, *supra*, 460 U.S. at 13-16; *Colorado River*, *supra*, 424 U.S. at 814-19. Pennzoil contends that two of those circumstances exist here.[11] We disagree.

---

11 Pennzoil concedes that two of the four circumstances, the so-called *Burford* exception, named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and the "exceptional circumstances" doctrine enunciated in *Colorado River*, *supra*, 424 U.S. at 818, do not apply in the present case. *Burford* calls for federal courts to decline jurisdiction "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case at bar . . . [or when] exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern", *Colorado River*, *supra*, 424 U.S. at 814. The "exceptional circumstances" doctrine applies to the rare case where "consideration of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" demand abstention. *Moses H. Cone*, *supra*, 460 U.S. at 15 (quoting *Colorado River*, *supra*, 424 U.S. at 817). Courts must weigh a range of factors when determining whether "exceptional circumstances" abstention is in order. *Moses H. Cone*, *supra*, 460 U.S. at 15-16.

One of the two abstention doctrines urged upon us by Pennzoil, which was formulated by the Supreme Court in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941), establishes that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority, supra*, 104 S. Ct. at 2327. *See also Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977). When determining whether *Pullman* demands abstention in a particular case, however, "the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather . . . abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Hawaii Housing Authority, supra*, 104 S. Ct. at 2327. Accordingly, *Pullman* abstention is not appropriate merely to give the state court a first chance to vindicate a federal claim, *Zwickler v. Koota*, 389 U.S. 241, 251 (1967), or when the possibility that state courts will provide a construction limiting the statute is "too speculative to justify or require avoidance of the question presented." *Ohio Bureau of Employment, supra*, 431 U.S. at 481.

The meaning of the Texas lien and bond provisions is far from uncertain. On the contrary, the language of Tex. R. Civ. P. 364 and Tex. Prop. Code Ann. §§ 52.001 *et seq.*, is crystal clear. To suspend enforcement of a judgment pending appeal the appellant must post a bond in at least the full amount of the judgment. *See* Texas court decisions cited *supra*, pp. 7-8. Texas courts have refused to reduce supersedeas bonds below the amount dictated

by Rule 364 even though the party seeking to appeal the decision claimed he could not post the required amount. *Mudd v. Mudd*, 665 S.W.2d 128 (Tex Civ. App. 1983). Indeed, Rule 364's predecessor, Art. 2270, Vernon's Ann. Civ. Stat., was similarly construed by Texas courts. *Anderson v. Pioneer Building & Loan Ass'n*, 150 S.W.2d 445 (Tex. Civ. App. 1941) (refusing to stay foreclosure and sale of home of 66-year-old woman, whose only income was her old-age pension, because she could not post supersedeas bond equal to the value of house). *See also Elliott v. Lester*, 126 S.W.2d 756, 759 (Tex. Civ. App. 1939); *Bryan v. Luhning*, 106 S.W.2d 403, 404-05 (Tex. Civ. App. 1937); *Dunlap v. Rotge*, 85 S.W.2d 650, 651 (Tex. Civ. App. 1935); *Cleveland v. Alpine Lumber Co.*, 70 S.W.2d 257, 257 (Tex. Civ. App. 1934).[12] Since there is nothing unclear or uncertain about the Texas lien and bond provisions here and the mere possibility that the Texas courts would find Rule 364 unconstitutional as applied does not call for *Pullman* abstention, *Zwickler, supra*, 389 U.S. at 251, this type of abstention cannot be justified.

Pennzoil also argues that *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny required the district court to

---

12 *Dillingham v. Putnam*, 14 S.W. 303 (Tex. 1890) (quoted with approval in *Nelson v. Krusen*, 678 S.W.2d 918, 921-22 (Tex. 1984)), held that a law conditioning the right of appeal on posting a supersedeas bond, regardless of whether appellant could post the bond, violated the Texas constitution's guarantee of the right to appeal. The law, however, unlike the lien and bond provisions at issue here, barred litigants from appealing. The cases cited *supra* demonstrate that the Texas courts have not read *Dillingham* to protect the right to stay enforcement of judgments pending appeal. Furthermore, *Pullman* abstention may not be predicated on the possibility that a state court could interpret the broad language of the state constitution to overrule a state statute or rule. *Hawaii Housing Authority, supra*, 105 S. Ct. at 2327 n.4; *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 438-39 (1971).

abstain. *Younger* counsels "federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority*, 104 S. Ct. at 2327-28. For *Younger* to apply three conditions must be present: (1) "important", "substantial" or "vital" state interests must be at stake, and (2) state procedures must be available to provide an adequate opportunity for the appellant to raise his federal claims in a state court, and (3) that there be an on-going state proceeding. *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Moore v. Sims*, 442 U.S. 415, 423-25 (1979). Since the third condition is clearly met in the present case, we need not discuss it.

With respect to the first of these essential elements of *Younger* abstention, Pennzoil asserts that two substantial Texas interests are at stake in this case: Texas' interest in protecting the rights of its citizens to obtain and enforce judgments in the Texas courts and Texas' interest in the constitutionality of its statutes. Every state, however, has similar interests in every state proceeding. Accepting Pennzoil's argument that these interests are sufficient to mandate abstention would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum, supra*, that federal courts are empowered by § 1983 to enjoin ongoing state proceedings. Not surprisingly, *Younger* and its progeny call for no such expansion. Pennzoil's contention would also render meaningless and unnecessary the exercise, regularly engaged in by federal courts called upon to abstain, of analyzing the state interests and remedies involved to determine whether *Younger* abstention is

mandated. *See, e.g., Traughber v. Beauchane*, 760 F.2d 673, 680-81 (6th Cir. 1985); *Miofsky v. Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983).

The state interests at stake in this proceeding differ in both kind and degree from those present in the six cases in which the Supreme Court held that *Younger* applied.[13] In each of those cases the state government or a state official was a party to the action which the federal court was being asked to enjoin and had a direct stake in the outcome since the state action was taken for the purpose of vindicating a particular state policy or remedying an infraction of state law. *See Middlesex Ethics Comm., supra* (federal court should abstain from enjoining agency of state Supreme Court from bringing state disciplinary proceeding against lawyer); *Moore, supra* (federal court should abstain from enjoining state action by state Department of Human Resources seeking emergency order under state Family Code to protect children from parental abuse); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (federal court should abstain from enjoining state court proceeding by state Department of Public Assistance to recover welfare money paid the defendants when they misrepresented their worth in applying for aid); *Juidice v. Vail*, 430 U.S. 327 (1977) (federal court should abstain from enjoining state court judges from enforcing order punishing appellant by jailing him for contempt); *Huffman, supra* (federal court should abstain from enjoining sheriff and county prosecutor from enforcing state civil

---

13 *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 402 U.S. 37 (1971).

nuisance statute); *Younger, supra*, (federal court should abstain from enjoining state criminal proceeding). The present case is dramatically different. Here the state has no interest in the underlying action. It is a suit between two private parties stemming from the defendant's alleged tortious interference with the plaintiff's contract with a third private party. An injunction here does not prevent any arm of the state from acting to vindicate a state policy or to punish an infraction of state rules.

Pennzoil argues that the court's holding in *Juidice v. Vail, supra*, to the effect that a federal court must abstain from enjoining a state judge from enforcing a contempt order demonstrates that the state has a substantial interest in the process by which it "protects the rights adjudicated in . . . [its] courts, and enables prevailing parties to satisfy. . . judgments." *Juidice*, however, cannot be read so broadly. The Supreme Court there emphasized that its holding turned on the fact that the contempt power was the weapon used directly by the state courts to protect their authority. The contempt power, the court noted, is the means by which the state "vindicates the regular operation of its judicial system. . . . The contempt power lies at the core of the administration of a State's judicial system." *Juidice, supra*, 430 U.S. at 335. "Contempt . . . serves, of course, to vindicate and preserve the private interests of competing litigants, . . . but its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 336 n.12. In the present case, Texas' limited interest in insuring that the interests of private litigants such as Pennzoil are preserved does not rise to

the level of a state's interest in safeguarding the basic power of its courts through contempt proceedings.

The relatively minor Texas state interest in the present case is further attested to by the fact that we are not called upon to declare the Texas lien and bond provisions to be unconstitutional on their face but only as applied to the unique and extraordinary circumstances of this case, which are unlikely ever to recur because here obtaining a $12 billion bond is impossible. Our exercise of federal jurisdiction under § 1983 does not open any floodgates. On the contrary, ours is a narrow holding limited to the unusual circumstances of this case. The Texas lien and bond provisions will in most other circumstances continue to be respected and enforced as written by the Texas legislature and the Texas Supreme Court. Thus our decision does not prevent the state from enforcing the policy behind the Texas lien and bond provisions, which is to insure that a judgment creditor's interest in a judgment will be protected during the pendency of an appeal. *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. Civ. App. 1983); *Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App. 1979). The unconstitutionality of those provisions as applied in the *Pennzoil-Texaco* case does not nullify them with respect to judgments in other cases.

Nor has Pennzoil satisfied the second requirement for *Younger* abstention, that Texas state courts provide adequate procedures for adjudication of Texaco's federal claims. If resolution of those claims is to be effective, prompt judicial action is essential; time is of the essence. It appears unlikely that Texaco could have been assured of a decision from the Texas trial court on the constitutional issues, at least without the cooperation of Penn-

zoil, before that court lost its jurisdiction over the case in March 1986. Texaco's effort to discuss modification of Par. 7 in December 1985 was rebuffed. The motion before the Texas trial court for a new trial is still pending. In view of the plain language of the Texas bond provision and the consistent line of Texas decisions enforcing it as written, the Texas trial judge would in all probability deny relief sought on constitutional grounds or leave the constitutional issues undecided until his jurisdiction expired.

Apparently recognizing the futility of Texaco's seeking to obtain a timely decision of its constitutional claims through the trial court and traditional appellate channels, Pennzoil urges that an application by Texaco to the Texas Supreme Court for a writ of mandamus ordering the trial court not to apply Rule 364(b) as written would satisfy the *Younger* requirements. We disagree. In the first place, the remedy of state court mandamus, which undoubtedly has been available in many cases denying *Younger* abstention, has never been regarded as an adequate state remedy for abstention purposes, in view of its status as an "extraordinary" writ to be granted only in exceptional circumstances. *Traughber, supra*, 760 F.2d at 684; *Holmes v. New York City Housing Authority*, 398 F.2d 262, 267 n.7 (2d Cir. 1968). Indeed, in *Hernandez v. Finley*, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979) (deciding *Trainor v. Hernandez, supra*, on remand), the Supreme Court affirmed the district court's finding that the remedies offered by the State of Illinois failed to "afford a plain, speedy, efficient and certain remedy for review of their federal claim", because they left review of a rejected federal claim to the discretion of the state's appellate

courts. *Hernandez*, *supra*, 471 F. Supp. at 520. Neither the district court nor the Supreme Court suggested that the availability to the private litigant of an original action for relief in the Illinois Supreme Court (similar to mandamus), *Illinois Supreme Court Rules* 381-83, constituted an "adequate state remedy". Each time the Supreme Court has found that adequate state remedies existed for *Younger* purposes, the Court's conclusion has rested on the fact that the party seeking § 1983 relief could with certainty obtain a resolution of constitutional claims from the state courts. *See*, *e.g.*, *Middlesex Ethics*, *supra*, 457 U.S. at 435-36; *Juidice*, *supra*, 430 U.S. at 337; *Moore*, *supra*, 442 U.S. at 423-27; *Huffman*, *supra*, 420 U.S. at 608.

Furthermore, we do not believe that mandamus, if granted, would provide Texaco an adequate and timely remedy. Under Texas law, mandamus "will not lie where no request or demand has been made for the performance of such act or where there has been no refusal to perform." *Dozier v. Wray*, 222 S.W.2d 178, 179 (Tex. Civ. App. 1949). *See also Kissam v. Williamson*, 545 S.W.2d 265, 267 (Tex. Civ. App. 1976); *Ratcliff v. Dickson*, 495 S.W.2d 35, 36 (Tex. Civ. App. 1973); *Cozby v. Clifton*, 265 S.W.2d 197, 198 (Tex. Civ. App. 1954). Texaco would be required, accordingly, to expend precious time in requesting the trial court to disregard Rule 364, which as noted, that court would probably fail to do, before seeking mandamus relief. Furthermore, even if the Texas Supreme Court issued the writ, Texaco's problems would not be at an end. There is no assurance that the Texas appellate court would grant an immediate stay of execution pending its decision on the constitutionality of the Texas lien and bond provisions or fix security in a

reasonable amount. Indeed, the Texas appellate court issuing a writ of mandamus "*will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.*" *Pope v. Ferguson*, 445 S.W.2d 950, 953 (Tex. 1969) (quoting *Ex parte Newman*, 81 U.S. 152, 165-66 (1871)) (emphasis in original). Rather, the Texas Supreme Court will remand the case to the trial court with instructions to obey the law as the Texas Supreme Court interprets it. *Pope*, *supra*, 445 S.W.2d at 953. In the present case, that rule would require the Texas Supreme Court to leave it to the Texas trial court to hold the necessary hearings and fix the proper amount of the supersedeas bond. An effort by Texaco to obtain more timely relief from a Justice of the United States Supreme Court under § 1257 would not succeed since the Supreme Court would not grant a stay until the Texas Supreme Court had acted. *See National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Nebraska Press Assn. v. Stuart, Judge*, 423 U.S. 1327, 1329-30 (1975) (Blackmun, J., in chambers). In the meantime, Par. 7 of the Texas judgment having long since expired, Pennzoil would have executed its $11.12 billion judgment, forcing Texaco down the path of no return.

The Merits: Requirements for Preliminary Injunctive Relief

There remains the question of whether, in light of the foregoing principles, the district court abused its discretion in granting relief. An abuse of discretion would exist if the court relied on clearly erroneous findings of fact or erroneous legal principles in issuing the injunction. *Han-*

son Trust PLC v. SCM Corp., 774 F.2d 47, 54 (2d Cir. 1985).

In this circuit the standard for issuance of preliminary injunctive relief is well-settled. The plaintiff has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor. *Kaplan v. Board of Education of the City School District of the City of New York*, 759 F.2d 256, 259 (2d Cir. 1985); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). The effect of the grant or withholding of such relief upon the public interest must also be considered. *Virginian Railway Co. v. System Federation*, 300 U.S. 515, 552 (1937); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974).

Irreparable Harm

It is beyond dispute that, absent injunctive relief, enforcement of Texas' lien and supersedeas bond provisions would rapidly produce a catastrophe of major proportions, causing substantial harm to Texaco itself and to thousands of others throughout the United States, including stockholders, customers, and suppliers. Pennzoil concedes that Texaco, although it has a liquidation value of $22 billion and a net worth of about $23 billion, could not possibly post a bond or security in the sum of the approximately $12 billion that is mandated by Tex. R. Civ. P. 364(b). The simultaneous attachment of a lien pursuant to Tex. Prop. Code Ann. §§ 52.001 *et seq.* on Texaco's real property in Texas, valued at $5 billion, would seal the company's fate. Unable to finance its

operations or obtain credit lines needed for its continued existence, Texaco, the fifth largest business organization in the United States, would be forced into bankruptcy or liquidation. A large percentage of its 55,000 employees world-wide, with an annual payroll of $1.6 billion, would lose their jobs. Approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would suffer heavy losses.

Some idea of the proportions of the threatened catastrophe can be gathered from the undisputed financial crisis that occurred during the week following entry of the Texas judgment. Despite the temporary "stand-still" provisions of Par. 7 of that judgment Texaco's bonds were downgraded by Moody's from investment grade to non-investment grade. It was forced to withdraw from the commercial paper market. Banks with which it did business advised that they would no longer lend it money on unsecured terms because of uncertainties as to what would happen when Par. 7 expired in March 1986. Similarly, because of these uncertainties, potential joint venturers with Texaco cancelled negotiations with it, suppliers refused to do business with it on regular customary terms, and companies refused to negotiate deals for the purchase of Texaco assets. The extent of the harm threatened by enforcement of the Texas judgment is further attested to by some 58 interested parties including 12 states, that have filed amicus briefs or other papers urging that enforcement be enjoined.

In determining whether a threatened injury pending appeal is irreparable it becomes important not only to assess its nature and anticipated duration but whether the plaintiff can be restored to the *status quo ante* if the appeal should result in a reversal in his favor. The

irreparability of the harm increases in proportion to its irreversibility. In most cases, if the judgment is reversed upon appeal, the attachment will be vacated and the property or the proceeds from its sale will be restored to the appellant. His sole harm will have been the deprivation of the use of the property or its monetary equivalent pending the appellate decision. But when, as in the present case, the interim injury is the irrevocable destruction of his business, resulting in bankruptcy or liquidation, a reversal will not undo the injury, which cannot be measured in damages and would in no event be recoverable. The evidence is equally persuasive that without injunctive relief the public interest would be adversely affected. *Virginia Ry. Co. v. System Federation*, *supra*, 300 U.S. at 552.

We are not called upon to review the merits of the Texas action. Indeed, it was not within the district court's province to do so. Under *Rooker* that is exclusively the province of the Texas courts. We must accept for present purposes that Pennzoil has established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a result Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim. However, only if Texaco's appeal were patently frivolous would we be justified in holding that any threatened harm to it from effective denial of its right of appeal could be labelled inconsequential. The issue before us, therefore, is not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution.

That Texaco has raised non-frivolous issues as the basis for its Texas appeal is clear. It argues (1) that the Texas trial court erred in not granting it a mistrial based on the acceptance by Texas Judge Anthony J. P. Farris, who presided over most of the 4-1/2-month trial until illness forced him to step down, of a $10,000 "campaign contribution" from Joseph D. Jamail, Esq., Pennzoil's lead trial counsel, while the case was pending before Judge Farris and without disclosure to Texaco; (2) that the successor Texas trial judge (Judge Casseb) refused to read the transcript of the testimony and proceedings that had occurred before Judge Farris and misapplied New York law (which the parties admit governed the case) with respect to (a) the essential elements of a claim of tortious interference with a contract, (b) when a punitive damages award is permissible, and (c) when a contract becomes legally enforceable; (3) that any contract between Getty and Pennzoil was void and unenforceable because it violated S.E.C. Rule 10b-13, the federal antitrust laws, state laws governing fiduciary duties of directors and controlling stockholders, and the Statute of Frauds, and was procured as the result of fraud or mutual mistake; (4) that an improper method was used to compute the award of $7.53 billion compensatory damages; and (5) that Texaco was entitled to judgment as a matter of law because the Texas judgment in Pennzoil's favor violated the Commerce, Supremacy, Full Faith and Credit, Due Process, and Equal Protection Clauses of the United States Constitution.

Fair Grounds for Litigation and Favorable Balance of Hardships

Having shown that without injunctive relief it would suffer irreparable injury, Texaco also had the burden of

demonstrating that it has a substantial chance of success on the merits of the present action (as distinguished from the merits of its Texas appeal) or at least that it has raised fair grounds for litigation and that the balance of hardships tips in its favor. *Kaplan, supra*, 759 F.2d at 259. We are satisfied that Texaco's claim that the Texas bond and lien provisions deny it due process presents a fair ground for litigation. Hence it becomes unnecessary to reach its claim that they also violate its equal protection rights.

The Texas constitution grants a right of appeal to all civil and criminal litigants. *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984); *Airco, Inc. v. Tijerina*, 603 S.W.2d 785 (Tex. 1980); *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965); *Dillingham v. Putnam*, 14 S.W. 303, 304-05 (Tex. 1890); *Moore v. Wutke*, 145 S.W.2d 224, 226 (Tex. Civ. App. 1940). Federal due process forbids the state from arbitrarily excluding certain parties from exercising that right. *Evitts v. Lucey*, 105 S. Ct. 830, 840 (1985); *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956). Furthermore, due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts, supra*, 105 S. Ct. at 841. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5 (1982). A state would deny a defendant such a "fair opportunity" if it reduced the appeal to a "meaningless ritual" by denying him the means effectively to press his appellate arguments, *Douglas v. California*, 372 U.S. 353, 358 (1963) (right to counsel in criminal appeals). *See also Evitts, supra* (right to effective assistance of counsel in criminal appeals). It is equally self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a

bonding law been robbed of any effectiveness. *Cf. National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 1324-25 (1975) (Blackmun, J., in chambers); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

Thus an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process. A serious question presenting fair grounds for litigation is therefore raised by Texaco's claim that enforcement of Texas' lien and bond requirements would reduce its appeal to a meaningless ritual. Since Texaco would be bankrupt or in liquidation by the time its appeals were decided the hardship to it would be immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits.

Against the hardship to Texaco from denial of a stay the district court was required to balance the threat to Pennzoil's interests caused by granting the stay. A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution." *Federal Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980). *See also C. Albert Sauter Co. v. Richard S. Sauter, Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973). In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment

debtors. *Federal Prescription Service*, *supra*, 636 F.2d at 760; *Poplar Grove Planting & Refining Co. v. Bache, Halsey, Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, *supra*, 368 F. Supp. at 520; *Trans World Airlines, Inc v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970), *aff'd in relevant part*, 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered. *Federal Prescription Service*, *supra*, 636 F.2d at 760. The court "may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery." *Id.* at 760-61. *See*, *e.g.*, *Trans World Airlines*, *supra* ($75 million bond to secure judgment of $145,448,140); *Sauter*, *supra* ($100,000 bond, stock placed in escrow, and restrictions imposed on financial commitments, to secure judgment of $1.2 million); *cf. International Telemeter v. Hamlin International Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) (appellant can be required to secure the judgment in ways other than by a supersedeas bond); *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981) (full bond not required if it would be "impossible or impractical" provided appellant proposes a "plan that [would] provide adequate security for the appellee").

In the present case there is no serious dispute that, should Texaco be required to liquidate its substantial

assets, it would be able to pay Pennzoil's judgment in full. Texaco's financial statement shows that, as of December 31, 1984, it had an appraised net worth of $22.622 billion. Indeed, on November 22, 1985, J. Hugh Liedtke, Chairman of Pennzoil's Board, stated that the liquidation value of Texaco was at least $22 billion and that "he did not doubt Texaco's ability to pay the damages." On December 6, 1985, he followed this statement up with the observation that "Texaco has $37 billion in assets," and that, "[a]fter paying off all the debts that they currently owe . . . some 11 billion dollars . . . they still have 26 billion and it's very adequate to cover what they owe us."

Thus Pennzoil's interest in protecting the full amount of its judgment during the appellate process is reasonably secured by the substantial excess of Texaco's net worth over the amount of Pennzoil's judgment. This undisputed evidence indicates that little, if any, security is required to protect Pennzoil's judgment pending appeal and that its pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal.

The hardship to Pennzoil from a grant of injunctive relief is, therefore, heavily outweighed by that which Texaco would suffer from the denial of such relief. Although a grant of injunctive relief deprives Pennzoil for the time being of a $5 billion lien and immediate execution of its judgment under Rule 364, it eventually will, in the event that its judgment is affirmed and the Texas lien and bond provisions are upheld, be in substantially the same position as it was prior to the issuance of

injunctive relief. It could then avail itself of the Texas lien and bond provisions and, if Texaco should be placed in bankruptcy, it would have the same creditor status as it would have had in the immediate bankruptcy that would have occurred in the absence of injunctive relief. There is no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the ordinary course of business or that it would transfer any of its assets to defraud Pennzoil. If any such evidence were adduced, Pennzoil would be justified in moving before the district court for a modification of the injunction.

The district judge did not apply the foregoing equitable rules in formulating the terms of the preliminary injunction. Instead he reviewed the Texas trial and judgment on the merits (but without benefit of the trial record), concluding that at most Pennzoil would be entitled to recovery of $800 million to which he added a $200 million allowance for costs, interest and attorney's fees in requiring that security of $1 billion be posted. This procedure was clearly erroneous and impermissible as a matter of law.

Normally we would remand the case to the district court to reconsider the terms of the preliminary injunction in light of this opinion. *Poplar Grove*, *supra*, 600 F.2d at 1191. However, that course does not appear to be necessary. The district judge acted entirely on the basis of affidavits which did not involve credibility issues. The facts relied upon by us in our foregoing analysis are undisputed. Time continues to be of the essence. Moreover, Texaco has now posted the $1 billion security required by the district court even though application of

equitable principles may have justified a bond in a lesser amount.

The preliminary injunction must therefore stand, subject to such applications as may be made by the parties, based on new evidence or a change in circumstances, with respect to the terms of security to be furnished in lieu of or in addition to the $1 billion security already posted. We do not view the terms of the preliminary injunction to be contrary to or inconsistent with those of Par. 7 of the Texas judgment, which remain in force and must be obeyed until they expire. Absent a proffer of additional evidence with respect to the merits of the present federal action, a hearing on the merits would appear to be unnecessary pending final disposition of the appeals of the Texas judgment.

Pennzoil argues, however, that any necessity for preliminary relief is dispelled by its "stipulation" that the Texas trial court may apply the standards of Fed. R. Civ. P. 62 to determine the security required of Texaco pending appeal. Pennzoil's "stipulation" does not solve the problems Texaco faces in this action. It has not been accepted by Judge Casseb or agreed to by Texaco, it does not waive Pennzoil's right to demand a supersedeas bond in the full amount of the judgment, and Pennzoil has reserved its right to seek such a bond. The "stipulation" is simply Pennzoil's unilateral request to the Texas trial court to apply the procedural rule of another jurisdiction. It is doubtful that a Texas state court, whose function is to apply Texas law, would consider itself any more jurisdictionally obligated, much less willing, to obey Pennzoil's request than it would be to apply Chinese or Russian procedural law simply because one party requested it. As noted in the *Restatement (Second), Conflict of Laws*

§ 122 (comment a) (1971), a forum "has compelling reasons" for applying its own procedural rules and "enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as . . . mode of trial and execution". *See also Restatement*, *supra* at § 131.

Texas courts have recognized that its rules of procedure are designed to promote procedural uniformity. *Rice v. Thompson*, 239 S.W.2d 137, 139 (Tex. Civ. App. 1951). Accordingly, "[i]t is not optional with trial or appellate courts to disregard [Texas procedural rules] because they do not meet with the approval of such courts." *Pearl Assur. Co. v. Williams*, 167 S.W.2d 808, 810 (Tex. Civ. App. 1942). *See generally*, 1 *R. McDonald, Texas Civil Practice*, § 0.04, at 6-10 (1981) (individual attorneys and the trial court are not free to rework rules of procedure). Furthermore, Texaco's refusal to agree to the stipulation is understandable, in view of the likelihood that a Texas state court accustomed to the Texas lien and bond provisions would interpret Rule 62 as consistently as possible with those provisions rather than exercise the wide discretion used by federal judges in ruling upon such applications. If Pennzoil had offered to accept a bond in a specific amount, our views might be different. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 687 (Tex. Civ. App. 1976); *United Benefit F. Ins. Co. v. Metropolitan Plumbing Co.*, 363 S.W.2d 843, 847 (Tex. Civ. App. 1962); *Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co.*, 63 S.W.2d 236, 237 (Tex. Civ. App. 1933). But its Rule 62 offer does not justify denial of injunctive relief in this action.

CONCLUSION

We conclude that federal jurisdiction exists over Texaco's claims that the mandatory Texas lien and bond provisions are unconstitutional as applied. The district court, moreover, was not required to abstain from exercising that jurisdiction.

We also conclude that the issuance of preliminary injunctive relief and requirement of $1 billion security as a condition thereof did not constitute an abuse of discretion. The district judge, however, clearly erred in assuming jurisdiction over other claims that had been adjudicated by the Texas court and in substituting his views for those of the Texas court and jury as to the application of New York law, the propriety of awarding punitive damages and the amount of compensatory damages that might properly have been awarded. Those issues rest solely within the jurisdiction of the Texas trial and appellate courts, which will give them careful consideration, and eventually with the United States Supreme Court, whose decision will be final.

We hasten to note that our decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur: a private civil money judgment in an amount unprecedented in the annals of legal history, a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal, the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment, and the likelihood that immediate enforcement of the Texas lien and bond provisions would lead to irreversible destruction of the

debtor before its appeal could be heard and decided on the merits, thus robbing its right of appeal of any meaning and effect. For these reasons our decision, like that of the Fifth Circuit in *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application.

The grant of preliminary injunctive relief, as modified, is affirmed on condition that Texaco promptly and diligently prosecute its appeal in the Texas appellate courts. Our affirmance is without prejudice to the rights of Pennzoil, upon a showing of changed circumstances, to move in the district court for modification of the terms of the preliminary injunction.

We remand the case to the district court with directions to dismiss Texaco's First, Second, Fourth, Fifth and Seventh Claims and to modify its January 16, 1986, order in accordance with this opinion. The district court will retain jurisdiction, pending the final decision of Texaco's appeal on the merits pursuant to 28 U.S.C. § 1257, for the purpose of ruling on any applications with respect to the security terms of the injunction arising out of changed circumstances.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

ORDER—Dated January 16, 1986

Upon all papers and proceedings had herein, including the Findings and Conclusions and Supplemental Findings of Fact made by this Court after a hearing pursuant to Rule 65, F.R.Civ.P. and dated January 10, 1986, it is hereby

1. ORDERED that the motion of plaintiff, Texaco Inc., for a preliminary injunction is hereby granted; and it is further

2. ORDERED that defendant, Pennzoil Company, its employees, agents, attorneys and servants, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are jointly and severally enjoined and restrained, pending the trial and ultimate disposition of this action, or the further order of this Court, from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company* v. *Texaco Inc.*, including, without limitation, attempting to obtain or file any judgment

lien or abstract of judgment related to said Judgment (pursuant to Tex. Prop. Code Ann. §§ 52.001, *et seq.*, or otherwise), or initiating or commencing steps to execute on said Judgment; and it is further

3. ORDERED that within 20 days following entry of this Order, plaintiff shall propose and submit to the Court security in the total amount of $1,000,000,000 (One Billion Dollars), including the sum of $1,000,000 (One Million Dollars) heretofore posted to secure the Temporary Restraining Order, which security shall be in a form satisfactory to the Court after having heard counsel for defendant Pennzoil Company on that subject; and it is further

4. ORDERED that a hearing concerning the appropriateness of any such security tendered by plaintiff Texaco Inc. may be heard on 24 hours' notice by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available; and it is further

5. ORDERED that the motion of defendant Pennzoil Company to dissolve the Temporary Restraining Order issued by this Court on December 17, 1985, and extended by consent of the parties by order dated December 23, 1985, and to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted and for want of subject matter jurisdiction, is hereby denied; and it is further

6. ORDERED that the status conference required pursuant to Rule 16, F.R.Civ.P. shall be held by this Court on April 7, 1986 in Courtroom 31 at the United States Courthouse, 101 East Post Road, White Plains, New York 10601.

Dated: White Plains, New York
January 16, 1986

/s/ CHARLES L. BRIEANT

Charles L. Brieant
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO, INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

ORDER ON REMAND—Dated April 8, 1986

Pursuant to the mandate of the United States Court of Appeals for the Second Circuit, dated February 20, 1986 and filed in this Court on March 14, 1986, and all prior proceedings, it is hereby ORDERED that the Order issued by this Court in this action on January 16, 1986 ("the Order"), be amended as follows:

1. The provisions of paragraph 2 of the Order shall expire upon the effective date of any final judgment in *Pennzoil Company v. Texaco Inc.*, No. 84-05905 (District Court for the 151st Judicial District of Texas), after exhaustion or expiration of all appellate remedies (whether as of right or discretionary, including expiration of the time in which a motion for rehearing or reconsideration may be heard) in the courts of the State of Texas and the United States Supreme Court.

2. A hearing concerning the appropriateness, in accord with the decision of the Court of Appeals, of the security previously posted herein by plaintiff Texaco, Inc. may be held on 24

hours' notice, or such shorter time as the Court may allow, by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available.

3. The first, second, fourth, fifth and seventh claims in plaintiff Texaco Inc.'s amended complaint are hereby dismissed for want of subject matter jurisdiction.

4. The making of a scheduling order in this action pursuant to Rule 16(b), Fed. R. Civ. P. is deferred indefinitely, subject to reconsideration upon the application to this Court of any party by notice of motion or on the Court's own motion.

5. No pre-trial discovery shall be taken in this action without the prior leave of the Court.

So Ordered.

Dated: White Plains, New York
April 8, 1986

/s/ CHARLES L. BRIEANT

Charles L. Brieant
U. S. D. J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO, INC.,

Plaintiff,

—v.—

PENNZOIL COMPANY,

Defendant.

OPINION—Dated January 10, 1986

Findings and Conclusions

BRIEANT, *District Judge.*

By a motion, pursuant to an Order to Show Cause, issued by this Court on December 17, 1985 and heard on January 9, 1986, plaintiff ("Texaco") seeks a provisional remedy in the nature of a preliminary injunction pending trial of the issues raised in its amended complaint, as follows: That defendant ("Pennzoil"), its employees, agents, attorneys and servants be jointly and severally enjoined and restrained from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company v. Texaco Inc.*, (hereinafter "the Judgment") including, without limitation, attempting to obtain or file any judgment, lien or abstract of judgment related to the Judgment (pursuant to Tex.Prop.Code Ann. ¶¶ 52.001, *et seq.*, or otherwise), or

initiating or commencing any steps to execute on the Judgment.

This Court issued a temporary restraining order to this effect on December 17, 1985 and extended it on consent of the parties by an order dated December 23, 1985. Following the hearing, that order remains in effect by oral direction of the Court.

Pennzoil, by a cross motion filed on December 20, 1985, also heard January 9, 1986, seeks to dissolve this Court's temporary restraining order and to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted and for want of subject matter jurisdiction.

Familiarity of the reader with the amended complaint filed December 13, 1985 must be assumed. In sum, Texaco's complaint pleads the following claims:

1. That the Judgment and the legal principles underlying it impermissibly burden interstate commerce by deterring competitive tender offers and therefore violate the Commerce Clause and frustrate the purposes of the Williams Act. (Claims One and Two).

2. That the Judgment conflicts with, and therefore is preempted by, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d), 78n(e) and 78bb, which promotes and provides a framework for competing tender offers. (Claim Four).

3. That the Judgment fundamentally changes the New York law of tortious inducement of breach of contract, in derogation of fundamental New York policies and in violation of the Full Faith and Credit Clause. (Claim Five).

4. That application of the supersedeas bond and lien provisions of Texas law effectively precludes Texaco from exercising its right to appeal in the Texas courts and, if necessary, to petition for *certiorari* to the United States Supreme Court, all in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (Claims Three and Six).

5. That the Judgment, as the result of a fundamentally unfair proceeding, violates the Due Process Clause of the Fourteenth Amendment. (Claim Seven).

The Court makes the following findings of fact and conclusions of law after a hearing, and pursuant to Rule 65, F.R.Civ.P.[1]

Jurisdiction

[1] The amended complaint filed in this Court on December 13, 1985 alleges that the enforcement of the Texas state court judgment will infringe rights secured to Texaco by the Commerce, Supremacy and Full Faith and Credit Clauses of the United States Constitution, Articles I, section 8, Article VI, Clause 2, and Article IV, section 1, clause 1, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and by the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Securities Exchange Act of 1934, 15 U.S.C. § 78a. As such, this complaint has plainly stated federal claims over which this court has subject matter jurisdiction under 28 U.S.C. §§ 1331(a) and 1343(a)(3). *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

Venue is proper in this District under all three grounds of 28 U.S.C. § 1391. The plaintiff has its principal office at White Plains, New York, and defendant does business in the Southern District of New York. The claims arose in this District. Personal jurisdiction over the defendant is satisfied by its presence in this District.

Second Circuit Injunction Standard

On a motion for a preliminary injunction in this Court, it is usually held that "the moving party has the burden of estab-

---

1 Both parties waived the taking of sworn oral testimony before the Court and the cross examination of affiants. *See* Transcript of January 9, 1986 at p. 3. No credibility issues are present which are relevant to the issues resolved by this decision.

lishing: (a) irreparable harm; and (b) either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary injunctive relief." *Kaplan v. Board of Education of the City School District of the City of New York*, 759 F.2d 256, 259 (2d Cir.1985) *citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

The mere fact that this case involves only private parties does not permit our inquiry with regard to irreparable harm to end with consideration only of the interests of Texaco and Pennzoil as parties before the Court. As our Court of Appeals, and the Supreme Court, have explained, "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir.1974), *quoting Virginian Railway Co. v. System Federation*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).[2]

Irreparable Harm

[2] Texaco is a very large corporation. It is said to be the fifth largest company in the United States and the third largest oil company. As such it has well established patterns of doing business, which have created a dependency upon it by not only a large number of employees throughout the nation, but also an even greater number of dealers and customers for its products and services, and suppliers. As the numerous letters from Congressmen and Senators docketed in this action and

---

2 The public interest in this proceeding is considerable. This Court has received a significant number of letters in the nature of *amicus curiae*. Among these eighteen letters, mostly from Senators and Congressmen, sixteen of them have directed this Court's attention to the economic importance of Texaco in various regions of the country. Four states (Wyoming, Oklahoma, Kansas and Florida) submitted formal *amicus curiae* briefs.

amicus curiae briefs from several states indicate, Texaco's death or insolvency would have a severe impact upon many people and regions throughout the country. In California, for example, Texaco employs over 4000 people (with aggregate annual salaries and wages in excess of $140 million) and conducts business with 16,000 suppliers. *See* letter of Rep. Glenn Anderson, M.C., dated Dec. 18, 1985. In Florida, Texaco pays approximately $6.7 million annually in state royalties and taxes. Brief of State of Florida, *amicus curiae*, at 2. Texaco contracts with over 4000 vendors in Louisiana and, during 1985, it expended over $1.4 billion in that state. *See* Letter of Louisiana Congressional delegation, dated December 16, 1985. Texaco employs about 55,000 people worldwide with a total payroll of $1.6 billion. In 1985 Texaco paid over $730 million in dividends to 319,000 shareholders. Affidavit of R. G. Brinkman, ¶ 3, (Dec. 17, 1985).

The sudden death or dismemberment of a corporation, while it is not analogous to the sudden death of an individual, hurts the public interest. This corporation should not be squeezed through the bankruptcy court or stopped in its tracks through a levy of execution or sale of its various assets under judgment or have its normal access to credit cut off, at least until appellate finality has attached to the Judgment. Unless enforcement of the Judgment is stayed by this Court, Texaco will confront these evils. The consequent harm to Texaco will be shared by those members of the public whose welfare is dependent upon Texaco's continued existence as a vital wealth-generating economic organism. As the multitude of affidavits submitted by Texaco make clear, Texaco has found it increasingly difficult to obtain the financing necessary to conduct its ordinary business operations. *See, e.g.*, Affidavits of Mr. R. G. Brinkman, dated December 17, 1985, December 19, 1985, and January 8, 1986.

The judgment with its present interest and costs amounts to $11.12 Billion. As measured by the stock market, which is rarely far wrong in such matters, the entire going concern or net worth of Texaco before the Judgment, was valued at

approximately $9.5 Billion. Various Pennzoil representatives have stated that this understates the true value of Texaco's assets. They assert that the actual value lies in the $23 to $37 Billion range. *See* Affidavit of Francis P. Barron, Esq. Exhibits 1 and 2. Even if these estimates are correct, there is no way in the world that Texaco could pay the Judgment without reorganizing or liquidating. This could only be accomplished pursuant to a consent plan or under a bankruptcy court's auspices because other creditors also have claims on Texaco's assets. Such relief does not provide an adequate remedy for Texaco. As the Supreme Court has found, the threat of bankruptcy adumbrates the irreparable harm necessary for the granting of a preliminary injunction. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975). Texaco would emerge as a fundamentally different company if it were obliged to reorganize pursuant to Chapter 11 of the Bankruptcy Code. This would be true even if the Pennzoil Judgment were later set aside.

Imposition of an injunction admittedly presents some risk of harm to Pennzoil's position. The risk of such harm, however, is slight. Indeed, Pennzoil's successful insistence upon the bond requirement might drive Texaco into Chapter 11 proceedings and leave Pennzoil with a Pyrrhic victory. A number of corporations, both large and small, have recently found that Congress has created a rather pleasant and profitable harbor of refuge in the bankruptcy court, where they may gain time and other special considerations in dealing with litigation. However, as we have explained, the availability of Chapter 11 is not an adequate remedy at law for Texaco in this case, so as to preclude injunctive relief, and bankruptcy of Texaco would have a most adverse effect on the public interest.

The imminent disruption to the national economy and to the interests of the public, supports a finding of irreparable harm, at least while the Texas judgment remains subject to appellate review. I include in the public Texaco's customers, suppliers, employees and others who would suffer from the sudden disruption in Texaco's day to day activities.

It should go without very much elaboration that Texaco itself would be irreparably damaged, and I so find. Immediate enforcement of the Judgment will further limit Texaco's ability to compete in the marketplace and to maintain its current level of business. Accordingly, I find and conclude that irreparable harm to the Public and to Texaco will occur if the Judgment is enforced in any way and to any extent prior to achieving appellate finality.

Likelihood of Success

This Court finds and concludes that a direct appeal from the Judgment would certainly be non-frivolous. The Court also finds that Texaco as an appellant has a substantial likelihood of success on a number of its non-federal points for appellate review in Texas or on a petition for *certiorari* to the Supreme Court of the United States.

This Court should not be regarded as attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action. *Cf. Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Our only intention is to assure Texaco its constitutional right to raise claims that we view as having a good chance of success.[3] The Court bases its analysis on New York law, which the parties concede is appli-

---

3 In reaching this conclusion, the Court places no reliance on the allegations of judicial impropriety in Texas, except to observe that Texaco should have the right to seek review of these contentions, along with its other more persuasive appellate points, without first being dismembered. Most judges are honest and sincere, and all should be presumed to be such. Those few who are not, do not throw a case for campaign contributions publicly recorded and probably long since spent. Instead, they live in a C.O.D. world where clandestine payments are made to a bagman. *United States v. Manton*, 107 F.2d 834, 840 (2d Cir.1939). That some judicial goodwill eventuated to the contributing lawyer we may assume. Goodwill means perhaps his brief will be accepted a day late, a golfing continuance may be granted, and his jokes may evoke more judicial laughter than they otherwise deserve. But it is impossible for a lawyer to rub his own goodwill off onto the client, or the merits of the client's cause.

cable to the claim in the Texas court and with which this court is very familiar.

The Court regards the Texas litigation as relatively simple. The only difficulty it presents is that it is posited in terms of such vast amounts of money that the ordinary principles and practices which affect the bonding of judgments or supersedeas arrangements for judgments are simply not practical.

Texaco has also raised here a number of federal statutory claims, over which the Federal Courts have exclusive jurisdiction. These claims raise serious questions going to the merits of the Judgment and present generally fair grounds for litigation.

Liability

For our present purposes we withhold comment about the contract law issue or the factual issue of knowing and willful tortious interference. This Court assumes, solely for purposes of its analysis of the issues presented on this motion, that Pennzoil properly prevailed on those issues. The Court in Texas which let these liability issues go to the jury and denied Texaco's motions for directed verdict and judgment notwithstanding the verdict is entitled to the benefit of the presumption of regularity and the presumption of correctness on its part. We should bear in mind that the damages in the case were fixed by a trial jury, not by the court itself in Texas. They do not represent the result of fact finding by the trial judge and in any event are still amenable to correction by direct appeal, and by a motion for a new trial, filed in Texas on January 9, 1986 and not yet resolved.

Punitive Damages

The trial jury awarded punitive damages in the amount of $3.0 Billion. The tort of interference with contractual relations is an intentional tort. In order to obtain punitive damages in this context, Pennzoil had to prove that Texaco's conduct was not only intentional but also motivated by "actual malice or ill will." *Anthony v. George T. Bye*, 243 App.Div. 390, 277 N.Y.S. 222 (1935).

While punitive damages have become quite fashionable lately, this case essentially involves a transaction in the commercial area where reasonable persons couid differ as to whether Getty was bound to a contract when Texaco acted. If there was no contract, of course there could be no tortious interference.

The standard for imposition of punitive damages in New York requires that the defendant's tortious activities be aimed at the public generally, as the New York State Court of Appeals explained in *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961). Punitive damage awards are also inapplicable where the availability of such an award is not essential to induce a potential plaintiff to go to court to right a wrong that might otherwise go unremedied if the injured party were limited to compensatory damages. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1080 (2d Cir.1977); *see also Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). These factors, either of which might justify the award of punitive damages, are not present in this case. Indeed, a substantial portion of the public at large, *viz.*, the public shareholders of Getty, benefited from Texaco's tortious activity, which greatly enhanced the proceeds realized for their investments.

No public policy of the State of New York is served by awarding punitive damages in this type of case, and this Court believes that a reviewing court in Texas will find that quite obvious. Furthermore, an award of punitive damages in this case is highly likely to have a negative impact on the federal policy which seeks to ensure that a company be sold via tender offer at a price that maximizes shareholder welfare. This federal policy is expressed in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(d), 78n(e), and the rules and regulations promulgated thereunder, and is well pleaded in the amended complaint in this case.

Compensatory Damages

Compensatory damages in New York are generally regarded as requiring an award of money which would make an injured

party whole, or, putting it differently, those damages which are based on the benefit of the bargain. Pennzoil does not dispute that its "agreement in principle" provided for its purchase of three-sevenths of the outstanding Getty shares. It had not arranged for the purchase of oil reserves, or any other specific Getty asset. It would have had as much control over Getty's oil assets as it would have had over the cable television networks then partly owned by Getty. In arm's-length negotiations, which the Texas jury found ripened into a firm contract, and this Court assumes for its present purposes that it did in fact so ripen into a binding contract, Pennzoil agreed to pay $112.50 per share for three-sevenths of Getty's outstanding shares, for a total price of $2.6 billion. At that price the market value of Getty's shares was approximately $6.1 billion.

Within a few days, Texaco agreed to purchase all of Getty's shares at $128 per share (an increase of $15.50 per share over the Pennzoil offer). At that price the market value of the outstanding Getty shares amounted to approximately $6.9 billion. The best indication of the value of anything, including the stock of an oil company, is usually an arm's length sale between adequately informed parties, neither under any compulsion to buy or sell; indeed, that is the traditional definition of market value. In this instance, the market value of Getty's outstanding shares was approximately $6.9 Billion.

If this verdict stands, the benefit of the bargain must be assumed by mathematics to be $7.53 billion, and the market value of Getty in excess of $10 billion. Expressed differently, if the verdict is valid, the Getty interests, in their transaction with Pennzoil, agreed to sell stock for $3 billion less than its true value. Expressed in percentage terms, the Getty interests sold the stock for 75 per cent of its value. This is absurd. If the jury's determination is the true value of the transaction, the contract would have been amenable to accusations of unconscionability, or overreaching, or perhaps even fraud in the inducement, not to mention the run-of-the-mill accusations of breach of fiduciary duty so often levelled against directors and trustees.

This Court therefore believes that the compensatory damages which flow from this breach of contract, tortiously induced by Texaco, should in no event exceed $800 Million, the approximate difference between the price per share offered by Pennzoil and the price offered by Texaco for all Getty's outstanding shares. That figure assumes that Pennzoil's bargain included the ultimate opportunity to purchase or otherwise control all the Getty shares.[4]

Pennzoil also had a duty under New York law to mitigate its damages. In the interests of brevity, and for lack of information, we do not touch on this issue, which could only serve to reduce Pennzoil's damages. The foregoing computations are presented only to demonstrate that the compensatory damages determined by the jury are too large by several orders of magnitude.

This Court accordingly finds that Texaco has a worthwhile appeal in the Texas courts, and that it is highly likely to succeed in reducing the damages to a considerable extent.[5]

---

4 Pennzoil's agreement in principle as announced in January 4, 1986 press releases, provided that Pennzoil would purchase a total of three-sevenths of Getty's shares and that Mr. Gordon P. Getty, as Trustee of the Sarah C. Getty Trust, would acquire the Getty shares held by the J. Paul Getty Museum. The arrangement would have left Pennzoil and the Getty Trust as the sole owners of Getty shares. The agreement in principle also provided that Getty would grant to Pennzoil an option to purchase up to 8 million treasury shares of Getty at a price of $110 per share. Also, Mr. Getty and Pennzoil agreed to maintain their proportionate shares of the company. It is highly likely that if Texaco had not acted to purchase all of Getty's shares, Pennzoil might have had to purchase, at some future time, the outstanding shares from the Getty Trust in order to effect total control over the company. Pennzoil was the logical purchaser if the Getty Trust determined to divest its shares at some future time. Accordingly, for our purposes we treat Pennzoil as having a strong likelihood of total ownership and control, although this may not be entirely accurate.

5 Texaco offered no proof of Pennzoil's damages. We do not understand this to be a waiver of the rule of law by which such damages are to be determined, even if Pennzoil's three experts testified to boxcar numbers.

Constitutional Claims

The State of Texas is not required by the United States Constitution to give a right of appeal at all. The Texas State Courts, however, have interpreted that state's Constitution, particularly Article I, §§ 13, 19, as recognizing such a right. *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ.App. 1931) ("A dissatisfied litigant has the constitutional right to have his case reviewed by the Court of Civil Appeals").

Having once determined to grant such a valuable right, the now well-established Fourteenth Amendment jurisprudence prevents the State from conditioning the effective exercise of that right on excessively restrictive conditions. The Supreme Court has reiterated on several occasions that, "[t]he fundamental requisite of due process is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *see also Boddie v. Connecticut*, 401 U.S. 371, 379-380, 91 S.Ct. 780, 786-87, 28 L.Ed.2d 113 (1971). Although the states are not required to establish avenues of appellate review, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 1819, 23 L.Ed.2d 440 (1969) (per curiam), quoting *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Pennzoil has cited dicta in *Lindsey v. Normet*, 405 U.S. 56, 77-79, 92 S.Ct. 862, 876-77, 31 L.Ed.2d 36 (1972), to support its claim that the Texas supersedeas bond provision is constitutional as applied to Texaco in this instance. In *Lindsey*, the Court considered a challenge to Oregon's double bond requirement for appeal in forcible entry and detainer actions. Although the Court agreed with the petitioners' claim that the double bond requirement violated the equal protection clause of the Fourteenth Amendment, it added in passing that other "reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals" would not

necessarily violate the equal protection clause of the Fourteenth Amendment. *Id.* at 78, 92 S.Ct. at 876 (Citations omitted). As described above, however, the challenged Texas supersedeas bond provision combined with the immediate enforcement of the Judgment would effectively bar Texaco's meritorious appeal.

While Texaco's appeal can be heard on the merits, this Court finds that there is no discretion in the Texas court to grant a stay of execution pending a meritorious appeal without posting a bond (or equivalent security) in the full amount, plus two years' interest at ten per cent, plus the anticipated costs of appeal, unless Pennzoil consents. Tex.R.Civ.P. Rule 364(a), (b). In this instance, the supersedeas bond would amount to more than $12 Billion Dollars, and in addition the Judgment will be a lien on Texaco's assets wherever filed, even if bonded.

The concept of posting a bond of more than $12 Billion is just so absurd, so impractical and so expensive that it hardly bears discussion. Texaco's right to appeal the Judgment to the Texas Court of Civil Appeals and, ultimately, to the United States Supreme Court, (provided by 28 U.S.C. § 1257) without a stay of its enforcement, would be meaningless. An $11 Billion Dollar lien on Texaco's assets would paralyze that company long before the Texas litigation reaches the point where the United States Supreme Court may decide whether to grant a Texaco petition for *certiorari*, should such relief prove necessary.

The Supreme Court directed us in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976) to assess the adequacy of state procedures that restrict an individual's property rights according to the following three factors: First, the nature of the private and state interests involved; second, the risk associated with erroneous deprivation of the right; and third, the extent of the administrative burden imposed upon the state by the required procedural safeguards.

In this case each of these three considerations cuts in favor of Texaco's right to a stay in order to appeal the state court verdict. The private interest and the state interests converge in

this instance. Texaco's obvious interest lies in its desire to remain in business while challenging the trial outcome. The state's interest in respect for its judgments and its legal process is furthered by ensuring Texaco's right to appeal.

As explained earlier, the risk of erroneous deprivation is quite severe in this instance. We have already outlined the irreparable nature of the injuries that Texaco would suffer if it is not granted relief from the challenged Texas state procedures. *See* pages [A59-A62] *supra*.

The administrative burden on the State of Texas will be slight. In order to assure Texaco of its right to enjoy a non-illusory appeal of the jury verdict, it need only provide access to its Court of Civil Appeals, as it would do normally. The only difference lies in the fact that Texaco may appeal the Judgment without posting the full $12 Billion bond and without fear that Pennzoil will immediately enforce the Judgment.

Obviously recognizing the force of this argument, Pennzoil, on December 20, 1985, submitted a "stipulation" to the Texas court, a copy of which was filed as document No. 14 in this action on the same date. This document, on its face simplicity itself, is not a stipulation in the sense commonly referred to; that is to say Texaco has not agreed to it, nor has the Texas court indicated its approval. It is a unilateral paper which reads in relevant part as follows:

> "Pennzoil Company, plaintiff in this action, hereby presents the Court the following stipulation concerning the judgment the Court entered in this action on December 10, 1985:
>
> 'Pennzoil stipulates and agrees that, if Texaco seeks to supersede or stay the enforcement of this judgment and it makes provisions to secure the judgment which the Texas courts determine would meet the standards of Fed.R.Civ.P. 62, Pennzoil will be bound by any stay that the Texas courts enter based on a finding that Texaco has

provided security which meets the standards of Fed.R.Civ.P. 62.'

WHEREFORE, Pennzoil requests that the Court accept this stipulation."

The filing of this so-called "stipulation" is not available to Pennzoil to defeat the Sixth Claim pleaded in Texaco's amended complaint. The Court finds no basis in our jurisprudence by which Texaco is required to accept this belated concession, nor is it established here that the Texas court must accept such a unilateral grant of power. It is abundantly clear on the record before me that the Texas court recognizes it has no power to give a stay pending appeal, except upon full compliance with Rule 364. This Court doubts very much that such a unilateral stipulation can give a court power to hear and decide an issue which it would not ordinarily have the power to hear and decide. I find, accordingly, that without injunctive relief from this Court Texaco will not be able to obtain a stay pending appeal without delay unless it provides security in the full amount.

Vivid evidence of this fact was demonstrated at our hearing, where it appeared that the trial judge in Texas, in order to obtain Pennzoil's "consent" to an extremely limited "standstill agreement," (see Judgment, ¶ 7, Ex. 1 to Amended Complaint) found it necessary to inform Pennzoil's counsel directly that if Pennzoil did not "consent" thereto, the court would exercise its so-called "broad discretion" to grant a new trial. It seems unlikely that a judge would find necessary such a forceful approach if, as Pennzoil now argues to this Court, there is ample basis for Texaco to get a stay equivalent to the injunctive relief it seeks from this Court by direct application to the trial judge in Texas. We need not infer that experienced participants would behave in such a bizarre fashion, as they apparently did in connection with the standstill agreement, if the judge believed he had the discretion to act pursuant to the standards of

Rule 62, F.R. Civ.P., or believed that such authority could be granted to him by unilateral stipulation.

Accordingly, the Court believes that on the sixth claim pleaded in Texaco's amended complaint here, which is based on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, plaintiff has a very clear probability of success.

Federal Statutory Claims

Insofar as the other claims pleaded are concerned, extended discussion at this time seems unnecessary. At the very least the Court finds that each one presents fair ground for litigation. As we noted earlier, if this judgment were enforced suddenly against Texaco, prior to having attained appellate finality, Texaco would be irreparably damaged, resulting in dismemberment and death of this economic enterprise. Accordingly, the balance of hardships on this point tips decidedly in favor of Texaco.

In litigating these federal issues in this Court, we note that Texaco would not be bound by any principles of *res judicata* or issue or claim preclusion as a result of the judgment in Texas. In a recent series of decisions in this area, the Supreme Court has clarified the application of res judicata principles in federal courts. In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the Court explained that a prior state court judgment should have the same claim preclusive effect in any federal court as it would in another court of that state. The Court based its decision on its interpretation of the Full Faith and Credit Clause of the Constitution as implemented by 28 U.S.C. § 1738. This general rule, however, is limited by the Court's later decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ____ U.S. ____ 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). In that case, the Court held that, although the Full Faith and Credit Statute requires the federal courts to examine the preclusive effect of state judgments according to that state's claim preclusion principles, that determination was only

a first step of the analysis. By way of fairly clear dictum, the Court stated that in some instances, a grant of exclusive jurisdiction to the federal courts for the protection of a particular statutory scheme may represent Congressional intent to repeal § 1738 for the purposes of that statutory scheme. The federal security law claims raised in this amended complaint may very well present an appropriate situation for an exception to § 1738 contemplated in *Marrese*.

The Judgment in Texas came out of a state tort action, arising under New York common law. It should not have any preclusive effect in litigating the federal security law claims pleaded here which are set forth in Claim Numbers Two and Four, in this complaint, because those claims arise under statutes as to which this Court has exclusive subject matter jurisdiction. 15 U.S.C. § 78aa.

Therefore, even with the assumption that the State of Texas applies the same claim preclusion principles that New York applies (which are about as broad as can be imagined because they include everything that was pleaded or could have been pleaded), this Court finds and concludes that federal claim preclusion as most recently outlined by the Supreme Court in *Marrese* would not extend to bar the federal question claims pleaded in Claims Two and Four of the Amended Complaint.

Any provisional remedy granted by this Court is granted for the day and conditions presently before the Court, and it is not required that this Court activate its crystal ball or predict in advance how long it will take to resolve the Texas appellate proceedings, or what the final outcome will be. However, even if the Judgment ripened into a final judgment in this vast amount of money, and assuming all decisions down the road go against Texaco, Texaco would still have the federal claims that are pleaded in this action, which it could litigate on the merits.

Federalism Concerns

[3] In spite of the foregoing it has been suggested that this Court should abstain or forebear in the issuance of an injunc-

tion because to do otherwise will violate basic principles of Federalism. These principles were first codified in the Anti-Injunction Statute of 1793; its current amended version is found at 28 U.S.C. § 2283. The Supreme Court expanded these principles when it developed the doctrine of federal abstention in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and also in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). There is also present for consideration the more recently developed concept of "Our Federalism," first announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Section 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Supreme Court, however, has not interpreted this prohibition as strictly as it reads. In *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the Supreme Court held that any federal statute that created "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding," *id.* at 237, 92 S.Ct. at 2159, provided an express authorization from Congress for a suit injunction. The Court further held that because § 1983 was enacted to redress inadequate state court remedies it provided the necessary specific authorization. Each of plaintiff's federal claims is properly brought pursuant to § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 7-8, 100 S.Ct. 2502, 2505-06, 65 L.Ed.2d 555 (1980) (plaintiff may enforce federal statutory rights in a § 1983 action); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (plaintiff may enforce due process claims in a § 1983 action); and *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 (6th Cir.1982) (Williams Act). *Henry v. First National Bank of Clarksdale*, 595 F.2d 292, 299 (5th Cir.1979).

The *Younger* concerns, which we must consider apart from the § 2283 analysis, similarly are not implicated here. The Supreme Court first enunciated the *Younger* doctrine to bar

federal interference in pending state criminal prosecutions. Since then the doctrine has been applied to civil proceedings only where the state has demonstrated a vital concern in the unimpaired operation of its laws. *See Moore v. Sims*, 442 U.S. 415, 425, 99 S.Ct. 2371, 2378, 60 L.Ed.2d 994 (1979). Thus the Court has limited the application of the *Younger* doctrine to those instances where a state was engaged in directly advancing important state interests in the state courts.

Indeed in each of the cases proposed by Pennzoil, the pending state actions were akin to criminal proceedings, or were necessary to insure the proper functioning of the state judicial system, e.g., in contempt citations or lawyers disciplinary proceedings. They concerned such contexts as the enforcement of an anti-obscenity statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); the application of an emergency child protection statute, *Moore v. Sims*, *supra*; the recovery of public assistance benefits fraudulently obtained, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); the enforcement of a civil contempt citation, *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); and the conduct of a state bar disciplinary hearing, *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).

Pennzoil also relies on *Middlesex County Ethics Committee*, *supra* to support its abstention argument. In that case, the Supreme Court ordered the federal district court to abstain from enjoining a state bar disciplinary proceeding on the ground that the federal plaintiff would have an adequate opportunity to interpose his federal constitutional defenses in that forum. *Id.* at 437, 102 S.Ct. at 2524. No such encroachment on state proceedings would result from granting the proposed equitable relief in this case. Far from impairing the operation of the state judicial system, this relief would now facilitate presentation to the Texas state courts of Texaco's challenge to the Judgment prior to an inevitable dismemberment caused by the bond provision, which would otherwise

attenuate both the appellant and the force of the appeal. The concerns of the federalism impelling the *Middlesex* decision are therefore not implicated here.

In each of the cases relied upon by Pennzoil, intervention by the federal court would have impaired seriously the pursuit of state interests. Such is not the case here. The preliminary injunction in this case will neither interfere with a state official's pursuit of a fundamental state interest nor enjoin a state proceeding. The sole purpose of this equitable relief is simply to afford Texaco an effective opportunity to initiate and complete appellate proceedings in Texas, followed by petition for *certiorari* to review in the Supreme Court without immediate enforcement of the Judgment.

The significance of the State of Texas' interest as defined by Pennzoil, *viz.*, the "proper functioning of its judicial system" does not necessarily cut in Pennzoil's favor. By its proposed "unilateral stipulation" Pennzoil purports to accord the Texas trial judge the discretion to impose security in a sum or form different from the total amount of the Judgment. Thus, Pennzoil is prepared not only to waive its right to a bond in the full amount of the Judgment plus interests and costs, but also to waive whatever important state interests underlie the procedures found in Rule 364(b). That these interests can be so easily waived by a private litigant, if they can, suggest that they are less than fundamental to the functioning of the Texas state judicial system.

Pennzoil's report that the trial judge had stated that he would grant Texaco's motion for a new trial unless Pennzoil's attorneys consented to Paragraph 7 of the Judgment (the "standstill" provision), suggests that he evidently thought that the state interest dictated some sort of relief to Texaco from the bond requirements of Rule 364. I conclude that only the most attenuated state interest is reflected in a rule which can be so waived or circumvented by a private litigant.

The *Pullman* abstention doctrine is even more restricted than the other two limitations on Federal Courts. In sum, this doctrine requires the federal court to abstain from decision

where resolution of an unclear state law can avoid a substantial constitutional question. *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970). Here, the state law is clear and the Texas state court judge has proved unable to circumvent the Draconian effect of the local law denying an unsecured stay pending appeal, without some sort of consent from Pennzoil.

Nor does the abstention doctrine embraced by the Court in *Burford*, *supra*, dictate that this Court stay its hand here. That case turned on the complexity of a state administrative scheme with which the state court had far greater expertise and knowledge.

Finally, we note that the imposition of this sort of injunction is hardly unique. In *Henry v. First National Bank of Clarksdale*, *supra*, the Court of Appeals upheld a district court order enjoining the enforcement of a final judgment against a state court defendant. In *Henry*, as in this case, the relatively large size of a damage award which was immediately enforceable against the state court defendants threatened irreparable harm to them if they attempted to post the required bond. *Henry*, 595 F.2d at 297.

Pennzoil has made an impressive effort to exsanguinate *Henry* as an available precedent for this case. *See* Pennzoil Memo at 30-33. Pennzoil argues, for example, that Texaco has not exhausted its state remedies, as the federal court plaintiffs did in *Henry*. It is well established, however, that exhaustion of state remedies is not a prerequisite to 1983 relief in Federal Courts. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In other instances the Supreme Court has not required that federal plaintiffs exhaust their state appeals before obtaining federal injunctive relief. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1976) (holding that such exhaustion is not required where the injunctive relief will not "annul the results of a state trial").

Pennzoil has also suggested that *Henry* is unique because the state court judgment had imposed restraints upon a "clear federal interest," *viz.* the federal plaintiff's free exercise of

their First Amendment rights. The plaintiffs in *Henry*, however, did not succeed in vindicating this "clear federal interest" until three years later, when the United States Supreme Court reversed the Mississippi State Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). While federal courts often declare that First Amendment rights are "special" the *Henry* Court made no attempt to limit the scope of its relief to Constitutional claims in general, or First Amendment claims in particular.

Thus, we find *Henry*, in its essential facts, indistinguishable from the instant case and embrace its analysis.

Accordingly, this Court finds there is no legal bar, and no genuine issue of disputed relevant fact that prevents granting this injunction. There is absolutely no reason in the world why it should not be granted.

Security

The next issue for consideration is what security should be required of Texaco pursuant to Rule 65(c), F.R.Civ.P. and as a condition for the provisional relief being granted. This Court is concerned lest other creditors of Texaco will come romping around the executive offices or run into the courts seeking to perfect security interests higher than that which would be available to Pennzoil. This would be unfair to Pennzoil, and it would also be contrary to the public interest and will have a deleterious effect on Texaco. Accordingly, the Court believes that this provisional remedy being granted here today must be secured by assets or obligations at least equal in value to what this Court regards as the maximum amount of compensatory damages which are likely to be awarded to Pennzoil on appeal or at a new trial limited to damages if such were to be granted.

This Court assumes that the price which Texaco paid for the Getty interests was an arm's length price representing the fair market value of what was acquired at the time and place it was bought and sold. Assuming that Pennzoil's claim that it had a valid contract will be upheld on appeal, since that contract price was $15.50 per share less than the price Texaco paid for the same assets, then the benefit of the bargain lost by

Pennzoil is, as observed earlier, approximately $800 Million. To this must be added an element for interest and costs and attorneys fees. The Court accordingly believes that a proper security for the provisional remedy being granted here today would be $1 Billion.

The Court will grant to Texaco a twenty (20) day period following entry of the order hereon, during which to propose and submit additional security for a preliminary injunction, beyond the sum of $1,000,000 posted to secure the Temporary Restraining Order, which shall be satisfactory to the Court, after having heard counsel for Pennzoil on that subject. Without limiting the future resolution of this matter by the Court, a letter or letters of credit, a surety bond, a deed or deeds of trust covering physical assets which are clearly of a value of that magnitude, a judgment lien, or any combination of those items, or anything else upon which the parties may agree, providing security in the amount of $1 Billion Dollars would be considered by this Court to be satisfactory. If the parties find it necessary to have a hearing as to the appropriateness of any security tendered by Texaco, that hearing may be held on 24 hours notice by application to the Deputy Clerk for an hour or date on which the Court will be available.

For the reasons set forth herein, the cross motion of defendant Pennzoil is denied.

The foregoing, together with certain formal supplemental findings of fact, to the extent that they are not inadvertently inconsistent with anything herein contained, constitutes the findings of fact and conclusions of the law of this Court pursuant to Rule 65(d), F.R.Civ.P. The Court directs that a formal order granting a preliminary injunction as requested be settled on five (5) days notice. The temporary restraining order previously granted herein is continued until such date as the formal order is actually signed and docketed.

The Court also directs that the status conference required pursuant to Rule 16, F.R.Civ.P. will be held by this Court on April 7, 1986 in Courtroom 31 at the United States Courthouse, 101 East Post Road, White Plains, New York 10601.

So Ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640 (CLB)

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT—
Dated January 10, 1986

Supplemental Findings of Fact found to the extent not inconsistent with this Court's opinion in writing of even date

I. BACKGROUND

A. *The Parties and the Getty Entities*

1. Plaintiff Texaco Inc. ("Texaco") is a Delaware corporation with a place of business in New York. (Amended Complaint, ¶ 11.)

2. Defendant Pennzoil Company ("Pennzoil") is a Delaware corporation with its principal place of business in Texas. (Amended Complaint, ¶ 12.)

3. Getty Oil Company ("Getty Oil") is a Delaware Corporation with its principal place of business in California. (Amended Complaint, ¶ 13.)

4. The Sarah C. Getty Trust (the "Trust") is a California Trust dated December 31, 1934. At all times relevant to this action, Mr. Gordon P. Getty served as sole Trustee ("Trustee") of the Trust. Before the consummation of the Texaco-Getty transaction set forth below, the Trustee held approximately 40.2% of the outstanding Getty Oil shares. (Amended Complaint, ¶ 14.)

5. The J. Paul Getty Museum (the "Museum"), before the consummation of the Texaco-Getty transaction set forth below, held approximately 11.8% of the outstanding Getty Oil shares. (Amended Complaint, ¶ 15.) (Getty Oil, the Trust, the Trustees and the Museum are occasionally referred to hereinafter as "the Getty entities".)

6. On December 28, 1983, Pennzoil announced a tender offer for 20% of the outstanding shares of Getty Oil at a price of $100 per share. (Amended Complaint, ¶ 19.)

7. On January 1, 1984, while its tender offer was still pending, Pennzoil proposed to Gordon Getty that Pennzoil acquire 3/7ths of the shares of Getty Oil at a price of $110 per share. (Amended Complaint, ¶ 19.)

8. During early January 1984, representatives of Getty Oil, including its investment bankers, initiated contact with Texaco and invited Texaco to submit a competing bid at a higher price than that offered by Pennzoil. The Getty Oil representatives later informed Texaco that the Getty Oil Board was also seeking competitive bids from other prospective purchasers. (Amended Complaint, ¶¶ 20-27.)

9. On the morning of January 4, Getty Oil and Pennzoil announced in two identically worded press releases that they had reached an "agreement in principle" to effect a merger. The press releases stated that the "agreement in principle" was

"subject to the execution of a definitive agreement". (Amended Complaint, ¶ 23.)

10. After the press releases had been issued, representatives of various of the Getty entities represented to Texaco on several occasions that the Getty entities were free to deal with Texaco and that no definite contract existed between the Getty entities and Pennzoil. (Amended Complaint, ¶¶ 23-26.)

11. Under the Pennzoil proposal, as announced in the press releases, the public shareholders of Getty Oil were to receive $112.50 per share for their Getty Oil shares. (Amended Complaint, ¶ 29).

12. In response to the Getty solicitations referred to above, Texaco made an initial offer of $125 per share in cash for all Getty shares. The Texaco offer was later increased to $128 per share in cash. (Amended Complaint, ¶ 29.)

13. The Getty Oil shareholders therefore were to receive $15.50 per share more under Texaco's offer than under Pennzoil's proposal. (Amended Complaint, ¶ 29.)

14. Pennzoil did not respond to Texaco's higher offer by timely raising its own offer. (Amended Complaint, ¶ 30.)

15. Between January 6, 1985, and January 8, 1985, Texaco signed definitive agreements with the Getty entities. The Getty Oil shareholders then overwhelmingly tendered their shares to Texaco, and the transaction was duly consummated. (Amended Complaint, ¶ 31.)

C. *Pennzoil v. Texaco*

16. On February 8, 1984, Pennzoil instituted suit against Texaco in the Harris County District Court, located in Houston, Texas, Pennzoil's principal place of business. The case was assigned to the Honorable Anthony J. P. Farris. (Amended Complaint, ¶ 32.) (This lawsuit is hereinafter referred to as the "*Pennzoil* action".)

17. Pennzoil's complaint alleged that Texaco had tortiously induced breach of a contract between the Getty entities and Pennzoil for the acquisition by Pennzoil of 3/7ths of the stock of Getty Oil. Pennzoil sought $7.53 billion in compensatory damages and $7.53 billion in punitive damages. (Amended Complaint, ¶ 33.)

18. Texaco answered Pennzoil's complaint on March 5, 1984. (Affidavit of Paul Curran ("Curran Aff."), sworn to December 20, 1985, ¶ 3.)

1. *The Campaign Contribution*

19. On March 7, 1984, Pennzoil's chief trial counsel, Joseph D. Jamail, made a lawful $10,000 campaign contribution to Judge Farris. At that time, Judge Farris was running unopposed in the upcoming May primary, and no opponent in the November 1984 election had yet been named. Neither Mr. Jamail nor Judge Farris disclosed to Texaco the $10,000 campaign contribution. (Curran Aff. ¶ 3.)

20. Texaco moved to recuse or disqualify Judge Farris under Canon 3C(1) of the Texas Code of Judicial Conduct, which provides for disqualification of a judge whose "impartiality might reasonably be questioned". Judge Farris declined to recuse himself. The Honorable E.E. Jordan denied Texaco's motion, accepting Pennzoil's argument that "mere bias" was insufficient basis for recusal or disqualification. (Curran Aff. ¶¶ 4-5.)

2. *Conduct of the Trial*

21. Pennzoil's presentation of its case-in-chief occupied the first two months of the four month trial of the *Pennzoil* action. During this period, Judge Farris maintained a relatively steady trial schedule. Shorty after Texaco commenced its case-in-chief, however, the Judge's health began to fail badly, so that he could hold court only infrequently. Of the 58 half-days available for Texaco's case-in-chief, only 21 were used. Texaco contends that its presentation was therefore necessarily dis-

jointed and confused and this contention presents fair ground for litigation. (Curran Aff. ¶ 15 & n.3.)

22. In late October 1985, after more than 3 months of trial, Judge Farris excused himself on account of illness. (Curran Aff. ¶ 15.)

23. The Honorable Solomon Casseb, a former Judge from San Antonio, then replaced Judge Farris. At that time, the trial was more than 75% complete and had generated over 17,000 pages of transcript. Judge Casseb stated that he had not read the record and would not read it. (Curran Aff. ¶¶ 15-16.)

24. Shortly after Judge Casseb entered the case, Texaco moved for a mistrial because of the new judge's unfamiliarity with the record. That motion was denied, and the trial proceeded to its conclusion before Judge Casseb. (Curran Aff. ¶ 16.)

3. *The Jury Charge*

25. During the charge conference, Judge Casseb again indicated that he was unfamiliar with the record and stated that he was relying on counsel in preparing his charge. (Curran Aff. ¶ 17.)

26. Both the parties and Judge Casseb agreed that the law of the State of New York, where the Pennzoil-Getty and Getty-Texaco negotiations occurred, should supply the rule of decision in the case. (Curran Aff. ¶ 17.)

27. Judge Casseb ultimately adopted Pennzoil's proposed charge substantially in its entirety. (Curran Aff. ¶ 18; *see also* Affidavit of G. Irvin Terrell ("Terrell Aff."), sworn to December 19, 1985, Exhibit 5.) Texaco has raised serious questions as to whether that charge accurately stated governing New York law in several material respects and whether the Special Issue findings of the jury were sufficient to support a judgment under New York law. (*See* Affidavit of Hugh R. Jones ("Jones Aff."), sworn to December 4, 1985, ¶¶ 12-40.)

4. *The Verdict and Entry of Judgment*

28. The case was submitted to the jury on November 15, 1985. After deliberating for approximately 9 hours, the jury returned a verdict in favor of Pennzoil, awarding compensatory damages of $7.53 billion and punitive damages of $3 billion. (Amended Complaint, ¶ 39; *see* Terrell Aff., Ex. 5.)

29. Under Texas procedure, judgment is entered upon a jury verdict for the plaintiff immediately upon denial of post-trial motions for judgment and for judgment notwithstanding the verdict, even though the defendant has 30 days to move for a new trial (*see* Tex. R. Civ. P. 329b(a)) and even though a motion for a new trial might not be denied for 45 days after being made (*see* Tex. R. Civ. P. 329b(c)).

30. On December 10, 1985, Judge Casseb granted Pennzoil's motion for judgment and denied Texaco's motions for judgment and for judgment notwithstanding the verdict and entered judgment for approximately $11.12 billion (the "Judgment"), representing $10.53 billion, the full amount of the jury's verdict, plus more than $600 million in prejudgment interest from January 6, 1985. (Affidavit of David Boies ("Boies Aff."), sworn to December 17, 1985, ¶ 3; Judgment, dated December 10, 1985.)

D. *The Lien and Bond Provisions of Texas Law*

31. Certain provisions of Texas law (hereinafter the "lien and bond provisions") applicable to the Judgment entitle a judgment creditor (a) to place liens upon the judgment debtor's real property located in Texas, and (b) to execute upon the judgment during the pendency of an appeal unless the appellant posts a supersedeas bond or other security in the full amount of the judgment, plus interest and costs.

1. *The Lien Provisions*

32. Section 52.001 of the Texas Property Code provides that "[a] first or subsequent abstract of judgment, when it is

recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing". Tex. Prop. Code Ann. § 52.001 (Vernon 1984).

33. Under § 52.001 *et seq.*, a judgment creditor may obtain judgment liens by requesting state officials to perform certain tasks, which the pertinent state officials are directed to perform and lack authority or discretion to decline to perform:

(a) Section 52.002 of the Texas Property Code provides that "[o]n application of a person in whose favor a judgment is rendered or on application of that person's agent, attorney, or assignee, . . . the clerk of the court that rendered the judgment shall prepare and deliver to the applicant an abstract of the judgment". Tex. Prop. Code Ann. § 52.002.

(b) Section 52.004 of the Texas Property Code provides that "[t]he county clerk [in a county where the judgment debtor's real property is located] shall immediately record in the county judgment records each properly authenticated abstract of judgment that is presented for recording". Tex. Prop. Code Ann. § 52.004.

(c) Under § 52.001, the lien attaches immediately after the clerk indexes and records the abstract. Tex. Prop. Code Ann. § 52.001.

34. Under Section 52.006 of the Texas Property Code, "[a] judgment lien continues for 10 years following the date of recording and indexing the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist". Tex. Prop. Code Ann. § 52.006.

35. Issuance of an abstract of judgment and its recording and indexing are ministerial acts that can be performed in a few minutes. (Affidavit of Thomas D. Barr ("Barr Aff."), sworn to December 17, 1985, ¶ 6.)

2. *The Bond Provisions*

36. Rule 627 of the Texas Rules of Civil Procedure provides that "[i]f no supersedeas bond . . . has been filed and approved, the clerk of the court . . . shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed". If a timely motion for new trial is made, the 30 day period runs "from the time the order overruling the motion is signed or . . . the motion is overruled by operation of law". Tex. R. Civ. P. 627.

37. Under Rule 364(a) of the Texas Rules of Civil Procedure, "an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk . . .". Tex. R. Civ. P. 364(a). Under Rule 364(b), for a money judgment, "the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs". Tex. R. Civ. P. 364(b). As an alternative to a bond, Rule 14c of the Texas Rules of Civil Procedure provides that "the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank . . ., in the amount fixed for the surety bond . . .". Tex. R. Civ. P. 14c.

38. For Texaco to obtain a stay of execution of the $11.12 billion Judgment under the bond provisions, it would be required to post a bond or other security in an amount sufficient to cover not only the Judgment, but also costs and interest for a period of two years at a rate of 10%, compounded annually. The total amount of such a bond would exceed $13 billion. (Affidavit of James B. Sales ("Sales Aff."), sworn to January 3, 1986, ¶ 17.) As found below, Texaco could not post security in that amount and remain a viable entity. (*See* §§ 74-81, *infra*.)

3. *Relationship of the Lien and Bond Provisions*

39. The lien and bond provisions of Texas law operate independently of each other. Even if the judgment debtor has

posted a bond and obtained a stay of execution under the bond provisions, the judgment creditor may still place judgment liens upon the debtor's real property. *Thulemeyer v. Jones*, 37 Tex. 560, 571 (1872); *Smith v. Kale*, 32 Tex. 290, 294 (1869). *See also* Sales Aff. ¶ 20. Similarly, absent a bond and stay of execution, the judgment creditor may proceed to execute upon any of the debtor's real property even if he has not sought to attach the debtor's real property. Tex. R. Civ. P. 627.

II. *EFFECT ON TEXACO OF THE LIEN AND BOND PROVISIONS*

A. *The Threat Posed by the Lien and Bond Provisions*

40. Immediately after the jury entered its $10.53 billion verdict in the *Pennzoil* action, the business and financial community concluded that Pennzoil would be able, under the lien and bond provisions of Texas law, to commence enforcement of any judgment entered on the verdict before Texaco's appeals had been resolved. The prospect that a judgment rendered on the verdict would be enforced before any appellate review raised serious uncertainties about Texaco's financial stability during the appeal period. (Affidavit of Richard G. Brinkman ("Brinkman Aff."), sworn to December 17, 1985, ¶ 6.)

41. As a result, persons became fearful that either (a) Texaco would fail to secure a $12 billion bond and its assets would be subject to execution or (b) there would be a liquidation of a substantial portion of Texaco's assets in an effort to raise the bond, and that in any case (c) Pennzoil would be able to place liens upon Texaco's real estate in Texas (and possibly in other states) immediately after entry of judgment and even if Texaco were to post a bond and obtain a stay of execution. (Affidavit of Julius L. Katz ("Katz Aff."), sworn to December 19, 1985, ¶ 5; Brinkman Aff. ¶¶ 7, 8.)

42. If Pennzoil were thus to execute upon or attach Texaco's assets, Texaco would suffer a substantial depletion of its asset base and severe impairment of its financial strength, and

would probably be compelled to enter bankruptcy, before an appeal from a judgment could even begin. (Brinkman Aff. ¶¶ 7, 8(a).)

B. *Paragraph 7 of the Judgment and Its Inadequacy*

43. [Deleted, see Rule 408 Fed. R. Evid, as irrelevant and privileged]

44. The purpose of Paragraph 7 of the Judgment was ostensibly "to preserve the status quo" while the *Pennzoil* action remained within the jurisdiction of the Texas trial court. (Judgment, ¶ 7.)

45. Paragraph 7 of the Judgment provides, *inter alia*, that:

"(a) Pennzoil shall not abstract, or request, or attempt to file any abstract of Judgment in this matter or file, register, levy or execute thereon or otherwise attempt to collect the Judgment in the State of Texas or elsewhere by reason of this Judgment by this Court in the matter without permission of this Court.

"(b) Texaco shall not pledge, encumber, convey, or otherwise dispose of any of its assets other than in the routine and ordinary course of business without permission of this Court. Financing involving sales or pledges of receivables or inventory are agreed to be in the ordinary course of business.

"(c) Texaco shall keep intact and not encumber, except in the routine and ordinary course of business, any of the properties and assets now owned by Texaco which were formerly owned by Getty Oil Company and its affiliate entities without permission of this Court." (Judgment, ¶ 7(a)-(c).)

46. By its terms, Paragraph 7 of the Judgment is effective only for so long as the Texas trial court retains jurisdiction of the *Pennzoil* action. (Judgment, ¶ 7(g)). Under Texas procedure, the Texas trial court will have jurisdiction of the *Pennzoil* action for not more than 105 days from the entry of the

Judgment on December 10, 1985, *i.e.*, until not later than March 25, 1986. (Barr Aff. ¶ 2.)

(a) Under Tex. R. Civ. P. 329b, the trial court retains jurisdiction to grant a new trial or to vacate, modify, correct or reform a judgment for 30 days after the judgment is signed. Tex. R. Civ. P. 329b. A motion for new trial must be made within this 30-day period. Tex. R. Civ. P. 329b(a). Texaco must therefore move for a new trial within 30 days after the signing of the Judgment on December 10, 1985, *i.e.*, on or before January 9, 1986. (Sales Aff. ¶ 13.)

(b) Under Tex. R. Civ. P. 329b(c), if a trial court fails to render a decision on a motion for new trial, the motion is overruled by operation of law 75 days after the judgment was signed. Tex. R. Civ. P. 329b(c). If Texaco moves for a new trial, its motion will be overruled by operation of law on February 23, 1986, if not acted upon sooner. (*Id.*; Sales Aff. ¶ 14.)

(c) Once a motion for new trial has been overruled, either by express ruling or by operation of law, the Texas trial court retains jurisdiction for a period of 30 days thereafter, even if an appeal is perfected in the meantime. Tex. R. Civ. P. 329b(e). After expiration of this 30-day period, however, trial court juris diction ceases. Tex. R. Civ. P. 329b(f). Thus, if Texaco moves for a new trial on January 9, 1986, trial court jurisdiction of the *Pennzoil* action could cease as early as February 8, 1986, if the new trial motion is immediately denied, and must cease, if the motion is denied by operation of law, on March 25, 1986, at the latest. (Sales Aff. ¶¶ 15, 16.)

47. Pennzoil has conceded that Paragraph 7 of the Judgment may be vacated or modified, or Pennzoil may be permitted to execute on the Judgment, at any time, after hearing on proper notice to Texaco. (Memorandum in Opposition to Texaco's Motion for a Preliminary Injunction and in Support

of Pennzoil's Cross-Motion to Dissolve the TRO and Dismiss the Amended Complaint, at 15-16.)

48. As set forth in detail below, Texaco's financial standing has greatly deteriorated despite Paragraph 7 of the Judgment. Paragraph 7 is effective only for a short period of time and can be modified or lifted, after notice and hearing, at any time. Under Paragraph 7, therefore, Pennzoil can soon commence to attach or execute upon Texaco's property in any event, and it may be able to do so before Paragraph 7 would otherwise expire; also Paragraph 7 forbids Texaco to transfer, encumber, convey or otherwise dispose of any of its assets, and to "keep intact" the assets formerly owned by Getty Oil, except "in the routine and ordinary course of business". Because the meaning of this phrase is uncertain, financial institutions and trade creditors are increasingly reluctant to deal with Texaco for fear that contemplated transactions would later be held invalid under Paragraph 7. (Affidavit of Donald P. Brennan ("Brennan Aff."), sworn to December 17, 1985, ¶ 8.)

C. *The Judgment's Severe Impact on Texaco's Standing in the Financial Markets, Notwithstanding Paragraph 7*

49. As detailed below, the threat that Pennzoil would enforce the lien and bond provisions before any appeal severely impaired Texaco's standing in all financial markets and imposed immediate and severe financial burdens upon the company even before the Judgment was entered.

1. *The Stock Market*

50. During the week immediately prior to the jury verdict, Texaco Inc.'s shares traded in the $39-1/2 range with daily volume averaging about 400,000 shares. After the verdict was rendered, the market for Texaco Inc.'s shares has been extremely volatile, with daily trades reaching 11 million shares on November 27, 1985, and the share price sinking to $31-1/2 as of December 6, 1985. Following entry of the Judgment on December 10, the value of Texaco's common stock fell still

further, closing at $28-7/8 on December 12. (Brinkman Aff. ¶ 11.)

2. *The Long-Term Debt Market*

51. Texaco has approximately $3.6 billion in bonds outstanding in the Eurodollar market. Prior to the jury's verdict, trading was relatively light and Texaco bonds traded at 60 to 70 basis points over comparable term United States Treasury Bonds. Immediately following the jury's verdict, the spread increased to 150 to 160 basis points over Treasury bonds. In the weeks following the verdict, the spread continued to widen and as of December 8, 1985, stood at 300 to 325 basis points over comparable Treasury bonds. Since entry of the Judgment on December 10, the market for Texaco's Eurodollar bonds has virtually disappeared. (Brinkman Aff. ¶ 12.)

52. Texaco has approximately $3.6 billion in bonds outstanding in the United States public market. In the few trades that were being made in the period shortly before entry of the Judgment, Texaco's medium term bonds were trading in the range of 300 basis points over comparable United States Treasury bonds. After entry of the Judgment, prices of Texaco's debt securities deteriorated further. (Brinkman Aff. ¶¶ 12, 13; see also Brennan Aff. ¶ 15.)

3. *The Ratings Agencies*

53. At the end of the third quarter of 1985, Texaco's long-term bonds were rated A1 by Moody's and A+ by Standard & Poor's. Securities rated A by Moody's "possess many favorable investment attributes and are to be considered as upper medium grade obligations." Securities rated A by Standard & Poor's have "a strong capacity to pay interest and repay principal . . . ." Such A rated securities are of investment grade, eligible to be held by fiduciaries and by insurance companies under legal investment rules. (Brinkman Aff. ¶ 4.)

54. At the end of the third quarter of 1985, Texaco's commercial paper was rated Prime-1 by Moody's and A-1 by

Standard & Poor's. Issuers rated Prime-1 by Moody's "have a superior capacity for repayment of short-term promis sory obligations". Standard & Poor's A-1 rating "indicates that the degree of safety regarding timely payment is either overwhelming or very strong". (Brinkman Aff. ¶ 5.)

55. On December 11, 1985 (the day after the entry of the Judgment, including Paragraph 7), Moody's, one of the major financial rating agencies, downgraded Texaco's senior debt securities from their prior investment grade level of A1 to the speculative, non-investment grade level of Ba1, indicating that Texaco's bonds "generally lack characteristics of a desirable investment". Moody's also downgraded Texaco's commercial paper from Prime-1, its highest level, to not prime. In its press release announcing that action, Moody's cited "the increasing possibility of a potentially crippling bond requirement, particularly in the appeals process". (Brinkman Aff. ¶ 14.)

56. On December 13, 1985, Standard & Poor's, the other major rating agency, lowered its rating of Texaco's senior debt from A+ to B, a category described as "predominantly speculative". Standard & Poor's also lowered its rating of Texaco's commercial paper from A-1 to C, a category described as having "doubtful capacity for payment". Standard & Poor's cited as a major factor in its decision the increasing likelihood of bankruptcy if Texaco were forced to post $12 billion in security for the Judgment. (Brinkman Aff. ¶ 15.)

57. These actions by the ratings agencies have foreclosed a significant—and for an issuer the most desirable—segment of the capital markets from purchasing Texaco's senior debt securities. Institutional investors with fiduciary responsibilities and legal investment requirements, such as insurance companies, pension funds and bank trust departments, are precluded from acquiring non-investment grade securities. (Brinkman Aff. ¶ 16.)

4. *The Commercial Paper Markets*

58. The uncertainty relating to Texaco's financial stability caused by the lien and bond provisions has caused Texaco to withdraw from the commercial paper market, which was previously a major source of short-term unsecured funds for the company because its paper cannot be sold at reasonable competitive discount rates in light of the uncertainty. (Brinkman Aff. ¶ 17.)

59. Texaco's inability as a practical matter to sell commercial paper has placed great strains upon the company. During the week of November 25, 1985, prior to entry of the Judgment, holders of 10% of the dollar value of Texaco's outstanding commercial paper requested that Texaco repurchase its paper. At that time, Texaco attempted to accommodate holders; for example, on November 27, 1985, Texaco redeemed $125 million of its commercial paper held by a commercial bank trust department. After entry of the Judgment, holders of an additional 11% of Texaco outstanding paper demanded repurchase. Texaco declined to repurchase its paper. (Brinkman Aff. ¶¶ 17, 18.)

60. Texaco will not be able to roll over its current outstanding obligations of approximately $2.4 billion as they mature. Texaco must therefore redeem its paper in full and in cash at maturity. Approximately $600 million matured by December 31, 1985, and an additional $600 million will mature by January 31, 1986. (Brinkman Aff. ¶ 19.)

5. *Commercial Banking Relationships*

61. Texaco relies upon commercial bank lending as an alternative source of short-term financing. Since entry of the Judgment, several major banks with which Texaco has had long-standing commercial relationships, including Bankers Trust Company and Morgan Guaranty Trust Company of New York, have informed Texaco that they will not make unsecured loans to the Company because of the threats that prior judgment liens may attach to Texaco's assets, or that Texaco may

undergo the financial strains of raising a $12 billion bond or suffering execution on the Judgment, prior to any appeals. (Brinkman Aff. ¶ 20.)

62. In addition to this inability to obtain new unsecured bank loans, Texaco cannot borrow under its authorized bank credit lines of approximately $4 billion. Before drawing on these lines, a borrower is required to represent that there has been no "material adverse change" in its financial condition in the period since the credit line was established. In view of the Judgment and the uncertainties about the lien and bond provisions, Texaco will not be able to make that representation. At least one bank has advised Texaco that it will not lend under the lines without such a representation. (Brinkman Aff. ¶ 21.)

63. Other banks with which Texaco has banking relationships have refused to provide customary forms of financing and banking services.

(a) Morgan Guaranty, Citibank, N.A., and Manufacturers Hanover Trust Company have refused to issue a $5 million unsecured letter of credit needed to cover a performance guarantee in connection with Texaco's current drilling obligations in Angola.

(b) Certain banks have requested that Texaco make cash deposits or have available funds in its accounts before they will transfer funds for payment of large crude oil and other obligations.

(c) Some of the banks that regularly handle Texaco's foreign exchange transactions, including Credit Suisse and Bank of Montreal, have been reluctant to quote foreign exchange forward contracts at a market price. Morgan Guaranty will not quote such contracts. If this trend continues, Texaco will be unable to meet its significant foreign currency requirements.

(d) Morgan Guaranty, the lender on an $85 million pipeline project Texaco is undertaking in the United States with Seagull Corporation, has expressed concern about

the status of that loan and has requested to meet with operating management. (Brinkman Aff. ¶ 22.)

6. *Trade Creditor and Co-Venturer Relationships*

64. Suppliers to Texaco have become increasingly concerned about the company's financial position in view of the possibility that the lien and bond provisions may force Texaco into bankruptcy. Such suppliers have increasingly been requesting either cash payments or security in the form of bank letters of credit.

(a) Major oil companies including Sonatrach (Algeria), C. Itoh & Co. Ltd., and Petro Lewis Corp., suppliers of the crude oil which constitutes the lifeblood of Texaco's operations, have insisted on letters of credit before supplying Texaco with additional crude oil. Other major suppliers, including Exxon Corp., Atlantic Richfield Co. and Shell Oil Company, have informed Texaco that supply contracts with Texaco are being reviewed in light of the Judgment.

(b) Southern California Edison, a major supplier of power to Texaco, has insisted that Texaco make weekly payments for electricity, effectively requiring Texaco to purchase power on a cash basis. (Brinkman Aff. ¶ 24.)

65. Some companies contemplating major commercial ventures with Texaco have reconsidered their plans in view of the uncertainties created by the lien and bond provisions. For example, on December 12, two days after the Judgment was entered, the Nippon Oil Company announced that it would delay a planned $100 million exploration program in Texaco's oilfields located in the United States, because of the uncertainties raised by the Judgment. (Brinkman Aff. ¶ 25.)

66. Other companies engaged in commercial ventures with Texaco have found their own financial standing impaired by virtue of their mere association with Texaco. For example:

(a) LOCAP Inc., a pipeline company 31% owned by Texaco, has been unable to roll over its commercial paper,

requiring all of LOCAP's owners to put up cash. (Brinkman Aff. ¶ 26.)

(b) On December 18, 1985, Moody's downgraded approximately $622 million in revenue bonds issued to construct the Louisiana Offshore Oil Port ("LOOP"), citing the fact that "Texaco is a 26.6% owner of the facility and a guarantor of part of its debt" and "the possibility of an acceleration of debt and . . . bankruptcy". (Supplemental Affidavit of Richard G. Brinkman ("Supp. Brinkman Aff."), sworn to December 19, 1985, ¶ 3.)

(c) On December 18, 1985, approximately $700 million in long-term debt of Pembroke Capital Co., a joint venture owned 65% by Texaco and 35% by Chevron Corp. that operates a processing unit in Wales, was downgraded to a speculative rating. (Supp. Brinkman Aff. ¶ 4.)

(d) On December 18, 1985, Moody's downgraded to a speculative rating approximately $20 million of financial paper issued by Magic Finance Co., a Texas pipeline company partly owned by Texaco, because its commercial paper is guaranteed by Texaco. (Supp. Brinkman Aff. ¶ 5.)

(e) On December 18, 1985, Standard & Poor's Corp. announced that it had placed on its "creditwatch" list for possible downgrading the commercial paper and senior debt ratings of five pipeline companies partly owned by Texaco: Badger Pipeline Co. (22% owned by Texaco); Colonial Pipeline (14.27% owned by Texaco); Explorer Pipeline Co. (15.97% owned by Texaco); LOCAP Inc. (30.8% owned by Texaco); and Loop Inc. (26.6% owned by Texaco). (Supp. Brinkman Aff. ¶ 6.)

(f) After entry of the Judgment, the Seminole Pipeline, in which a Texaco subsidiary is a joint venturer, was unable to roll over its commercial paper and was required to draw on back-up bank commitments, which must be

refinanced by January 3, 1986. (Supp. Brinkman Aff. ¶ 7.)

D. *Impairment of Texaco's Operating Flexibility*

67. In addition to its failure to stem the adverse effects upon Texaco's standing within the financial markets and with trade creditors and co-venturers, discussed above, ¶ 7 of the Judgment has affirmatively impaired Texaco's ability to enter into transactions that are helpful to its business. (Affidavit of James W. Kinnear ("Kinnear Aff."), sworn to December 17, 1985, ¶ 6.) Under Paragraph 7, Texaco may not "pledge, encumber, convey, or otherwise dispose of" any of its assets, and must "keep intact" its Getty Oil assets, except "in the routine and ordinary course of business". (Judgment ¶ 7(b), (c).) As set forth below, uncertainties concerning the scope of this exception have hampered Texaco's operating flexibility.

68. Texaco is a very large company, constantly seeking to deploy its assets with optimal efficiency. As such, it frequently enters into sales transactions, both in this country and abroad, which are substantial in that they involve many millions of dollars, but which nonetheless do not involve a significant proportion of Texaco's assets. (Kinnear Aff. ¶¶ 7-14.)

69. Prospective purchasers of Texaco's assets as well as their advisers and lenders have been unwilling to assume that such multi-million dollar transactions fall within the "routine and ordinary course of business" as that term is used in Paragraph 7 of the Judgment. This uncertainty and unwillingness to deal with Texaco have hampered its ability to redeploy its assets efficiently, as it must to remain competitive. (Kinnear Aff. ¶¶ 15-16.)

70. The uncertainties caused by Paragraph 7 have also effectively prevented Texaco from obtaining secured financing except through the pledge or sale of inventory or receivables. Under Paragraph 7, lenders to Texaco face the risk that such secured financing will later be determined to have been other than "in the routine and ordinary course of business" within

the meaning of Paragraph 7(b). Faced with this uncertainty, prospective secured lenders are reluctant to proceed with transactions with the Company. (Brinkman Aff. ¶ 29(b).)

E. *The Threat of Bankruptcy Caused By the Lien and Bond Provisions*

1. *Attachment of Liens*

71. Texaco's real property in Texas that is subject to attachment under the lien provisions has a total value of approximately $5 billion and comprises many of Texaco Inc.'s producing oilfields. On the basis of the Judgment, approximately 22 other states would permit Pennzoil to place liens on Texaco Inc.'s real property situated in those states. (Brinkman Aff. ¶ 8(a).)

72. Because Texaco does not now have any significant secured creditors, the lien provisions would make Pennzoil Texaco's only significant secured creditor at a time when the liens would cut off much of Texaco's cash flow. This sudden alteration in Texaco's debt structure and financial condition would cause lenders, suppliers and other creditors to cut off credit and supplies to the company. The effect would probably be to force Texaco into bankruptcy prior to any appeal or, indeed, even before the completion of proceedings in the trial court. (Brinkman Aff. ¶ 8(a).) (Barr Aff. ¶ 7.)

73. Attachment of judgment liens could also trigger default and acceleration provisions in indentures governing over $440 million of Texaco's long-term debt. Default under those provisions would, in turn, trigger cross-defaults under still other indentures, accelerating the maturity of a further $1.3 billion of Texaco's long-term debt. Such defaults would render Texaco unable to obtain additional credit while requiring it to raise $1.74 billion (on top of all its other cash needs) to pay the accelerated indebtedness. (Brinkman Aff. ¶ 8(b).)

2. *The Bond Requirement*

74. Texaco could not obtain a surety bond in an amount even approaching $12 billion from any insurance company or combination of insurance companies. The estimated surety bond capacity available world-wide ranges from $1 billion to $1.5 billion under the best possible circumstances. Further, a surety bond in those amounts would require full collateralization. (Brinkman Aff. ¶ 31.)

75. Texaco cannot post cash collateral in lieu of a bond in that amount. Texaco does not have sufficient liquid assets, or assets which are readily convertible to liquid assets through domestic borrowings, and does not have access to such assets, to provide $12 billion in cash or cash equivalents. As of September 30, 1985, Texaco had cash, cash equivalents and marketable securities of $1.5 billion. These assets are required to run Texaco's business. Thus, the funds necessary to satisfy a bond would have to be borrowed. (Brinkman Aff. ¶ 32.)

76. Given the strains (detailed above) that the size of the verdict and the threat of the lien and bond provisions have placed upon Texaco's finances, Texaco could not borrow $12 billion on an unsecured basis in the present circumstances. (Brinkman Aff. ¶¶ 32, 33; Affidavit of John F. McGillicuddy ("McGillicuddy Aff."), sworn to December 19, 1985, ¶ 3; Affidavit of David D. Burrows ("Burrows Aff."), sworn to December 19, 1985, and Letter from David D. Burrows to Edward W. Wolahan, dated December 19, 1985, annexed thereto.)

77. Neither can Texaco raise the necessary sum by pledging or mortgaging its assets. Texaco's outstanding unsubordinated debt securities require that, when Texaco borrows on a secured basis, its unsubordinated debt securities must be secured equally and ratably. If Texaco Inc. were to borrow on the security of its principal properties in order to support a bond, it would actually have to secure borrowings substantially in excess of the $12 billion necessary for the bond in order to

avoid default on its unsubordinated debt securities. Texaco currently has $5.7 billion in outstanding unsubordinated debt securities which contain such restrictions on liens; thus, Texaco Inc. would have to pledge or cause to be pledged at least an additional $5.7 billion in assets, over and above the $12 billion needed to obtain a bond. Further, because lenders would require a significant margin of security to lend in such circumstances, Texaco would actually have to provide collateral in an amount well above this $17.7 billion total. (Brinkman Aff. ¶ 35.)

78. Assuming that Texaco Inc. could borrow up to $12 billion, cash flow available from operations thereafter would not be sufficient to pay the full service cost of the debt, especially in the declining crude oil market. Furthermore, borrowing of that magnitude would effectively destroy the financial condition and flexibility of the company. The debt to capitalization ratio would be increased to over 90% and interest coverage would be only slightly over 1 to 1. Funds would not be available for payment of dividends or for the capital expenditures which would be essential if the company were to continue to operate on a viable basis. (Brinkman Aff. ¶ 36.)

79. Texaco could probably not finance a $12 billion bond through resort to the high yield, or junk bond, market. Even the comparatively risk-accepting investors who purchase these securities might be hesitant to purchase debt securities from a company with Texaco's pro forma credit position as adjusted to reflect the Judgment and the requirement of a bond. Moreover, the amount of financing that the company could raise through junk bonds would be insignificant when compared to its operating needs and the $12 billion bond requirement. In 1985, through mid-December, the total junk bond market had raised approximately $14.8 billion, with the largest single issue producing less than $1 billion of total proceeds. In addition, any junk bond financings would have to be accomplished in a market that, as of mid-December 1985, had an

issue backlog of $6 to $8 billion and was saturated with previously unsold issues. (Brennan Aff. ¶ 20.)

80. Finally, while Texaco could attempt to raise cash by liquidating assets, it is doubtful that such a liquidation, which would necessarily occur on a distress sale basis in a very short period of time, would yield $12 billion. (Brinkman Aff. ¶ 37.) The list of potential buyers for major energy assets has been reduced dramatically due to the significant energy company acquisitions, mergers and industry restructurings that have occurred over the past four years, and many of the remaining firms are so highly leveraged as to bar further substantial acquisitions. The current uncertainty surrounding future energy prices has also made prospective buyers more cautious and less likely to submit fully-priced bids. Thus, while some Texaco properties could be sold quickly (particularly to existing partners), the dollar value received for these assets would likely be less than fair value, even if an orderly sale process were implemented. (Brennan Aff. ¶ 17.)

81. In any event, at the end of such a massive liquidation, Texaco would be a depleted and dismembered enterprise, consisting of cash or cash equivalents and a liability of roughly $12 billion to Pennzoil, plus existing senior and subordinated debt of $7.2 billion and numerous other liabilities, which the company would be unable to service or pay. (Brinkman Aff. ¶ 37.)

F. *The Inability of Texaco to Obtain Adequate Relief in the Texas Courts*

82. On December 13, 1985, William R. Edwards, co-counsel for Texaco, wrote to the Texas trial court urgently requesting a conference to consider whether any modification of the Judgment, and particularly of the provisions of Paragraph 7, could be made to offer assurance to lenders and others who deal with Texaco that Pennzoil would not take steps to attach judgment liens or otherwise execute on the Judgment pending appeal. (Boies Aff. ¶ 9 and Exhibit 8 thereto.)

83. By handwritten note dated December 13, 1985, the Texas trial court responded that it was available, subject to agreement of all counsel, for a hearing on December 16, 17 or 18. (Boies Aff. ¶ 10 and Exhibit 9 thereto).

84. By telephone on December 14, 1985, counsel for Pennzoil notified counsel for Texaco that Pennzoil would not agree to a hearing on any of the dates indicated by the Texas trial court or at any other time, and that Pennzoil would have no further response to Texaco's request for a hearing. (Boies Aff. ¶ 10 and Exhibit 10 thereto.)

85. By letter dated December 14, 1985, counsel for Texaco advised the Texas trial court of Pennzoil's refusal to agree to any hearing date and again requested that the court set a date for a hearing. (Supp. Boies Aff. ¶ 3 and Exhibit 13 thereto.)

86. On December 16, 1985, Pennzoil's counsel wrote to the Texas trial court urging that Texaco's request for a hearing be denied and that any similar request be governed by the timing and notice provisions of the Texas Rules of Civil Procedure. (Supp. Boies Aff. ¶ 4 and Exhibit 14 thereto.)

87. On December 17, William R. Edwards, co-counsel for Texaco, received a letter from the Texas trial court dated December 16, 1985, which stated that "the record in this case does not show you or your firm as 'attorney of record' for Texaco Inc." and that "this Court does not act on any 'ex parte communications' " and requires "adherence to the rules as to notices and requests for hearings thereon". (Supp. Boies Aff. ¶ 5 and Exhibit 18 thereto.)

88. Mr. Edwards had filed a notice of appearance as counsel for Texaco at the December 10 hearing when the Judgment was entered. His appearance for Texaco had been recorded in the transcript of the hearing. He had addressed the Texas trial court at the December 10 hearing without objection from the court or counsel for Pennzoil, had signed the Judgment at the court's request and had written by hand the interlineations appearing on the Judgment. (Boies Aff. ¶ 13.)

89. Mr. Edwards' letters of December 13 and 14 addressed to the court were not ex parte communications. They were contemporaneously delivered to all counsel, and they indicated that they were so delivered. (Boies Aff. ¶ 13.)

90. By letter of December 17, Richard P. Keeton, co-counsel for Texaco, advised the Texas trial court that (a) Mr. Edwards was in fact an attorney of record for Texaco and (b) the letters of December 13 and 14 were not submitted ex parte. Mr. Keeton again urged the court to set a hearing, as requested in the letters of December 13 and 14. (Supp. Boies Aff. ¶ 6 and Exhibit 16 thereto.)

91. To date, the Texas trial court has not scheduled a hearing.

2. *The Inability of the Texas Trial Court to Grant Relief*

92. The Texas bond provision is mandatory and grants the Texas courts no discretion to reduce the amount of the bond required. The provision states that "the amount of the bond or deposit *shall be at least* the amount of the judgment, interest and costs." (Tex. R. Civ. P. 364(b) (emphasis added).)

93. Texas courts and commentators have uniformly held that the bond provision is non-discretionary. (*See, e.g., Haney Elec. Co. v. Hurst*, 608 S.W.2d 358, 356 (Tex. Civ. App. 1980) ("[a] money judgment may not be partially superseded"); *Mudd v. Mudd*, 655 S.W.2d 128, 130 (Tex. Civ. App. 1983) ("Rule 364 . . . prescribes the least amount at which the bond can be set"); *Opinions of Subcommittee on Interpretation of Rules* ("[t]he bond should therefore be in a sum *at least* the amount of the judgment plus . . . interest . . . [and] costs. . . . This Rule contains *no exception* that would allow a supersedeas of a part of an entire judgment for damages") (quoted in *Tex. Rules Civ. Proc. Ann.*, pp. 159-60 (Vernon's 1985) (emphasis added); *see also Deal v. Bonner*, 667 S.W.2d 635 (Tex. Civ. App. 1984); *Fortune v. McElhenney*, 645 S.W.2d 934 (Tex. Civ. App., no writ); *Cooper v. Bowser*, 583 S.W.2d

805 (Tex. Civ. App. 1979, no writ); *Schrader v. Garcia*, 512 S.W.2d 830 (Tex. Civ. App. 1974, no writ); Sales Aff. ¶ 18.)

94. Application by Texaco to the Texas trial court to reduce the bond requirement under Rule 364 would be futile if that court followed and applied to the case the established precedents of Texas state law relating to the issue. While that court has the power, and indeed the duty to consider reduction of the bond on federal Constitutional grounds, there is no legal requirement that Texaco must request it do so, in order for Texaco to obtain relief from this Court on such Constitutional grounds.

3. *The Lack of an Effective and Meaningful Remedy in the Texas Appellate Courts*

95. Under Texas procedure, "the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive." Tex. R. Civ. P. 365(b). This provision, however, permits a Texas appellate court to reduce the amount of a bond only where the amount set by the trial court unreasonably exceeds the amount of the judgment, plus interest and costs. The provision would not allow a reduction in the bond required of Texaco below the amount of the Judgment. (*Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Kennesaw Life & Accident Insurance Co. v. Streetman*, 644 S.W.2d 915, 917 (Tex. Civ. App. 1983); *see also* Sales Aff. ¶ 19.)

96. A petition by Texaco for an extraordinary writ in the Texas appellate courts might also be futile and is not a condition precedent to making application to this Court for relief on Constitutional grounds. It is unlikely that an intermediate appellate court would find discretion to reduce the amount of the bond in the face of an unambiguous rule, promulgated by the Texas Supreme Court, which has uniformly been interpreted to confer no such discretion. (Sales Aff. ¶ 82). Further, even if there were such discretion, "[m]andamus is not available to compel a discretionary act".

(*Washington v. McSpadden*, 676 S.W.2d 420, 422 (Tex. Crim. App. 1984).) In any event, the Texas appellate courts could not act upon any petition for an extraordinary writ in time to provide effective relief to Texaco. (Sales Aff. ¶¶ 28-35.)

97. While Texas does permit expedited appeals, the Texas appellate courts probably could not hear and determine an appeal in an action of this magnitude before the trial court's jurisdiction ceases and the provisions of Paragraph 7 expire. An expedited appeal would probably therefore be ineffective in preventing the harm threatened to Texaco. (Sales Aff. ¶¶ 21-27.)

98. [Deleted.]

99. As found below, Pennzoil has publicly admitted that Texaco's assets are currently more than sufficient to pay the Judgment. (*See* ¶ 137, *infra*.) At the same time, however, Pennzoil has been threatening to invoke the lien and bond provisions against Texaco because it believes itself entitled to do so as a matter of Texas law. On December 12, 1985, The Wall Street Journal reported that, according to Pennzoil's chairman, Mr. Liedtke, Pennzoil is " 'going to put pressure' on state Judge Solomon Casseb to permit Pennzoil to levy liens against Texaco's assets" unless Pennzoil is satisfied with Texaco's settlement proposals. (Boies Aff. ¶ 8(a) and Exhibit 3 thereto).

100. On December 16, 1985, The Wall Street Journal reported that Pennzoil's director and "legal strategist", Baine Kerr, had "charged that Texaco may have violated the standstill agreement [contained in Paragraph 7 of the Judgment] by providing letters of credit from its bankers in purchasing products and services". According to the newspaper account, Mr. Kerr stated that "letters of credit secured by Texaco's purchased products 'aren't specifically permitted under the Court agreement' ". (Boies Aff. ¶ 8(b) and Exhibit 7 thereto).

101. On December 31, 1985, The Wall Street Journal reported that "sources say [that] Pennzoil aims to send a signal

to Texaco that it is ready to begin attaching assets if it isn't satisfied with the progress of the [parties' settlement] talks". (Supp. Boies Aff. ¶ 10.)

102. From time to time in discussions with Texaco, Pennzoil has taken the position that by instituting the present federal action in this Court, Texaco may have waived its right to appeal from the Judgment in the Texas appellate courts. (Supp. Boies Aff. ¶ 8.)

III. IRREPARABLE INJURY

A. *Irreparable Injury to Texaco*

103. Texaco will suffer irreparable injury unless Pennzoil is enjoined from placing judgment liens on Texaco's property in the full amount of $13 Billion or more or executing on the Judgment in any significant amount.

104. As found above, the jury's verdict and entry of the Judgment have, despite the provisions of Paragraph 7 of the Judgment, caused a massive loss of confidence in Texaco on the part of its security holders, lenders, trade creditors, business partners and others who do business with or depend upon the company. This loss of confidence has itself caused severe and irreparable injury to Texaco. (*See* ¶¶ 49-66, *supra*.)

105. Permitting Pennzoil to place liens on Texaco's real property in the full amount sought will accelerate the existing loss of confidence in the company, cause its creditors and suppliers to withdraw or withhold funds and credit from Texaco and drain it of the working capital needed to carry on its business. The effect would probably be to force Texaco to seek protection from its creditors by filing for reorganization under Chapter 11 of the Bankruptcy Code before it can prosecute to a conclusion any appeal from the Judgment, if this Court were to deny an adequate provisional remedy to Texaco. Application of the lien provisions will therefore cause irreparable injury to Texaco. (*See* ¶¶ 71-73, *supra*.)

106. As found above, Texaco cannot obtain a supersedeas bond in the amount required by Texaco law and can post security acceptable under Texas law only by liquidating assets in a manner that would effectively dismantle the company or force it into bankruptcy. Alternatively, if Texaco were unable to post acceptable security, Pennzoil would be able to execute upon the Judgment in a manner that would as effectively liquidate and dismantle the company. Application of the bond provisions will therefore cause irreparable injury to Texaco. (*See* ¶¶ 74-81, *supra*.)

107. Because the lien and bond provisions operate independently of each other, Texaco will sustain irreparable injury unless full application of both the lien and the bond provisions is enjoined.

108. As set forth below, application of the lien and bond provisions will also cause irreparable injury to persons other than Texaco and to several distinct and important national interests. Further, the contention that the Judgment and the rule of law on which it appears to rest threaten a deterrent effect upon competitive tender offers, and thus upon the national economy, which application of the lien and bond provisions will magnify presents fair ground for litigation in this action.

B. *Irreparable Injury to Public Interests*

1. *Injury to Other Persons*

109. Texaco is the fifth largest industrial company and the third largest oil company in the United States. As of September 30, 1985, Texaco Inc. had 319,000 stockholders, who receive a $3.00 per share annual common stock dividend, totaling $730 million for 1985. Texaco currently employs about 55,000 people on a worldwide basis, with aggregate annual salaries and wages in excess of $1.6 billion. Texaco has almost 13,000 former U.S. employees who continue to receive compensation. Texaco spent $3.7 billion in 1984 for capital and exploratory expenditures. In 1984 Texaco sold approximately one billion

barrels of petroleum products worldwide, of which 414 million barrels were sold in the United States. In the United States alone, Texaco products are sold through 18,000 retail service stations. (Brinkman Aff. ¶ 3.)

110. Unless full application of the lien and bond provisions is enjoined, the bankruptcy or liquidation of Texaco will cause irreparable injury to Texaco's shareholders, employees, retirees, creditors and business partners. If Texaco enters bankruptcy, the value of its stock and debt securities will further decline. Its shareholders will be deprived of dividend income. Creditors, particularly trade creditors, may be unable to obtain their funds pending reorganization. Texaco's suppliers, customers, joint venturers and other business partners include not only other large corporations, but also thousands of smaller businesses, particularly retail service stations, which are entirely dependent upon Texaco for products and revenues. If Texaco is irreparably harmed or destroyed, most of these other enterprises may find their own businesses disrupted, and many will find their own business and financial standing irreparably impaired.

111. Responsible representatives of several states have advised the Court of the important role which Texaco plays in their states' economies. Premature enforcement of the Judgment, before Texaco has exercised its right to a meaningful appeal, will cause irreparable injury to the citizens and economic interests of those states. For example:

(a) In Alabama, Texaco does business with some 1300 suppliers and has more than $217 million in assets. It has an active oil and gas exploration program there. Premature enforcement of the Judgment would cause irreparable injury to the many persons in Alabama, including employees, suppliers and others, who depend upon Texaco's activities there. (Letter of Hon. Jeremiah Denton and Hon. Howell Heflin, dated December 18, 1985.)

(b) In California, Texaco has over 4200 employees and an annual payroll of over $141 million. Texaco does

business with more than 16,000 suppliers in California, and more than 28,000 Texaco shareholders reside there. Texaco's assets in California are valued at over $1.9 billion. Texaco is involved in many major projects in California, including sensitive enhanced oil recovery projects in the Kern River area and the federally-supported Cool Water gasification facility. Including employees, shareholders, suppliers, retail outlets and others, more than 48,000 Californians would suffer irreparable injury through premature enforcement of the Judgment. (Letters of Hon. Glenn M. Anderson, Hon. William M. Thomas and Hon. Jerry Lewis, all dated December 18, 1985.)

(c) In Delaware, Texaco has over 675 employees and an annual payroll exceeding $28 million. It pays more than $7 million in state taxes annually. It does business with some 1,000 suppliers, and more than 1200 Texaco shareholders reside there. Its assets in Delaware are valued at over $400 million. Including employees, stockholders, royalty holders, suppliers, branded retail outlets and others, some 3000 Delawareans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Hon. Michael N. Castle, dated December 19, 1985; Letter of Hon. William V. Roth, Jr., dated December 20, 1985.)

(d) In Kansas, Texaco has 1000 employees and an annual payroll of $27 million. It does business with more than 4000 Kansas suppliers. It paid over $69 million in royalties to approximately 6700 Kansas royalty holders in 1985. Its assets in Kansas exceed $189 million. Including employees, stockholders, royalty holders, retirees, suppliers and branded retail outlets, almost 16,000 Kansans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Kansas Congressional Delegation, dated December 18, 1985; Brief of State of Kansas as Amicus Curiae, dated December 20, 1985.)

(e) In Louisiana, Texaco has some 4400 employees and an annual payroll exceeding $162.5 million. It paid more than $107 million in state taxes in 1985 and made royalty payments to the state of some $56 million. It does business with more than 4000 suppliers in Louisiana. Its estimated 1985 cash expenditures in Louisiana were some $1.4 billion. Including employees, stockholders, royalty holders and others, thousands of Louisianans would sustain irreparable injury through premature enforcement of the Judgment. (Letter of Louisiana Congressional Delegation, dated December 16, 1985.)

(f) In New York, Texaco has over 2600 employees and an annual payroll exceeding $110 million. It paid more than $21 million in state taxes in 1984. It does business with more than 4700 suppliers in New York, and more than 30,000 Texaco shareholders reside there. Including employees, shareholders, suppliers and others, more than 37,300 New Yorkers would suffer irreparable injury through premature enforcement of the Judgment. (Letter of Hon. Hamilton Fish, Jr., dated December 18, 1985.)

(g) In Oklahoma, Texaco has some 1650 employees and an annual payroll of some $58 million. It indirectly supplies employment to more than 9,000. It paid over $124 million to Oklahoma royalty holders in 1985. Its assets in Oklahoma are valued at over $686 million. Including employees, shareholders, royalty holders, retirees, suppliers and branded retail outlets, over 41,000 Oklahomans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Oklahoma Congressional Delegation, dated December 18, 1985; Brief of Oklahoma as Amicus Curiae, dated December 19, 1985.)

(h) In Wyoming, Texaco has some 250 employees. Approximately 1000 Texaco shareholders reside there. Approximately 2400 Wyoming residents receive royalty payments from Texaco, and the state receives some $24 million annually in taxes and royalties. Texaco's assets in

> Wyoming are valued at more than $500 million. Including employees, shareholders, royalty holders, suppliers and others, thousands of Wyoming citizens would suffer irreparable injury through premature enforcement of the Judgment. (Brief of State of Wyoming as Amicus Curiae, dated December 19, 1985.)

112. It is fair to anticipate that Texaco's bankruptcy or liquidation will cause significant injury to the national economy as a whole.

2. *Injury to Financial Markets*

113. The nation's financial markets are complicated, interdependent, volatile and sensitive. The actions and movements of these markets reflect not only measurable financial developments and directions but also emotions and attitudes which exist from time to time. (Affidavit of John F. McGillicuddy, sworn to December 19, 1985 ("McGillicuddy Aff."), ¶ 4.)

114. As found above, the mere prospect that the lien and bond provisions might be applied against Texaco prior to any appeal has caused significant disruption to markets for securities issued by Texaco and its co-venturers. (See ¶¶ 50-60, 66 *supra*.)

115. While it is impossible to predict the exact effect of Texaco's bankruptcy or liquidation upon the financial markets, it is fair to anticipate that there would be significant adverse effects. (McGillicuddy Aff. ¶ 4.)

116. [Deleted]

117. [Deleted]

3. *Injury to International Commerce*

118. As the third largest oil company in the United States, Texaco does business in some 150 foreign countries. (Affidavit of Julius L. Katz, sworn to December 19, 1985 "Katz Aff.", ¶ 7.)

119. Because of Texaco's size and the importance of its presence in major oil producing and trading regions of the world, the inability of Texaco to function in a normal manner which would result from application of the lien and bond provisions would cause a significant reduction in the role played by the United States in certain oil exporting countries. (Katz Aff. ¶ 7.)

120. In some parts of the world, the uncertainties of the situation could lead to the displacement of Texaco in favor of other entities, including non-American entities. The displacement of Texaco in important oil producing and exporting nations by foreign entities would adversely affect this country's balance of payments by reducing its earnings abroad. (Katz Aff. ¶ 8.)

121. [Deleted]

122. Although the world oil market is currently glutted, United States oil reserves have steadily declined since 1971. Over the long term, the dependence of the United States on imported oil and especially Middle Eastern oil will increase. The disruption or diminution of Texaco's present role as an important finder, producer and exporter of oil throughout the world may only make this country's oil supply less secure. (Katz Aff. ¶ 10.)

4. *Injury to National Security and Foreign Policy*

123. Many of the 150 foreign nations in which Texaco does business and owns and maintains assets are strategically significant to the national security and foreign policy interests of the United States. Many of these countries are located in areas of the world that are economically or politically unstable or are themselves economically or politically unstable. (Affidavit of Kenneth W. Dam ("Dam Aff."), sworn to December 19, 1985, ¶ 3.)

124. In addition to Texaco's importance as an American presence and source of economic stability in certain regions

throughout the world, Texaco has been and continues to be an important supplier to United States military forces in remote and strategically important areas of the world. Texaco's bankruptcy or liquidation might impair its ability to supply military forces and could thus impair national security. (Dam Aff. ¶ 4.)

125. Texaco's bankruptcy or liquidation could provide an occasion for certain host governments or opposition political groups to seek to reduce American business interests and influence in their countries by nationalizing Texaco's assets and operations or transferring them to a foreign oil company. (Dam Aff. ¶ 5.)

126. [Deleted]

127. The possibility of Texaco's destruction could prompt foreign governments or opposition political forces to take actions in anticipation of Texaco's final demise that are harmful to the national security or foreign policy of the United States. (Dam Aff. ¶ 7.)

C. *The Deterrent Effect upon Tender Offers*

The following paragraphs through 136 are contentions which present fair ground for litigation in this Court:

128. Our national economy is based upon a system of competitive capitalism in which the person who is willing to pay the highest price receives the benefit of any investment opportunity. In the context of the sale of companies, this system should encourage a public auction in which the highest bidder wins. This system allocates the nation's resources to their highest valued uses and maximizes the value of shareholders' investment in publicly held companies. (Affidavit of Lester C. Thurow ("Thurow Aff."), sworn to December 29, 1985, ¶ 5.)

129. Free and open competition for investment opportunities is constrained by the law of contracts. Once two parties have entered into a binding contract, the competition has

ended, and bidders who arrive thereafter come too late. Timely bidding is thus an important part of the competitive process. Parties to a contract must be able to rely on their contract once it has been concluded. (Thurow Aff. ¶ 6.)

130. Thus, competitive capitalism is based on two fundamental propositions:

> *First*, there should be free and open competition among parties seeking investment opportunities.
>
> *Second*, when the competition is over, the parties must be able to rely on their contracts. (Thurow Aff. ¶ 7.)

131. For this system of competitive capitalism to function properly, there must be rules specifying when the auction is still open and when it has ended. These rules must be clearly articulated and must be applied in an objective, consistent and predictable manner. Otherwise, participants in the competition cannot discern the rules and guide their conduct in accordance with them.

> (a) Rules concerning contract formation must define a reasonably clear line indicating when a contract has been created. Parties involved in negotiations must be able to determine in advance which actions will have the effect of binding them.
>
> (b) The rules governing when a party may be held liable for interfering with a contract must also be clear. Investors competing for investment opportunities must be able to determine in advance when the auction is over, and they should be held liable only when they induce a breach of contract after they know that the competition is over. (Thurow Aff. ¶ 8.)

132. Texaco has raised a serious and substantial question as to whether the jury in the *Pennzoil* action found that a contract has been created at a point in the negotiations well in advance of the point at which objective and knowledgeable investors would have said that a contract had been created. The jury apparently found a binding agreement even though

both Pennzoil and Getty Oil expressly made their "agreement in principle" subject to a definitive agreement which was never negotiated or signed. Further, the jury apparently imposed liability on Texaco despite the fact that both Pennzoil and Getty entities had publicly announced this reservation of rights and despite the fact that the Getty entities had advised Texaco that there was no prior contract and invited Texaco to bid. (Thurow Aff. ¶ 9; Affidavit of Simon P. Orme ("Orme Aff."), sworn to January 7, 1986, ¶ 2.)

133. The Judgment, if based on the above premises, would pose a significant threat to the national economy for two reasons:

(a) *First*, it would establish a rule of law greatly at variance with the rules of competitive capitalism as generally understood.

(b) *Second*, it would suggest that there may not be any reliable rules, that the rules may be whatever a local jury decides they are, and that an investor who competes runs the risk that a jury may later decide to impose massive damages because it believes the investor broke the rules. (Thurow Aff. ¶ 10.)

134. The Judgment would, therefore, introduce great uncertainty into the process by which public companies are sold. This uncertainty would deter potential bidders from entering an auction for corporate control. Once an initial offeror had begun discussion of any substance with a target company, potential competing offerors would be reluctant to make a competing offer and thereby assume the risk, potentially enormous, that they would later be determined to have interfered with arrangements with the first offeror and the target company. This reluctance would exist even where the target company clearly solicited an alternative bid and gave assurances that it had not reached a contract with the initial bidder. The potential competing offeror might be deterred even if given assurances that there had been no substantive negotiations at all with the initial bidder, given the risk that a jury might later

conclude that there had in fact been such negotiations and that they gave rise to a binding agreement. (Thurow Aff. ¶ 11; Orme Aff. ¶ 3.)

135. The uncertainty created by the Judgment would inevitably chill the competitive capitalism that is a necessary part of our national economy. (Thurow Aff. ¶ 13; Orme Aff. ¶¶ 3, 4.)

136. If, because of application of the lien and bond provisions, Texaco is unable to secure meaningful appellate review of the serious and substantial questions raised by the Judgment, the *in terrorem* effect of the Judgment of the national economy will be exacerbated. (Thurow Aff. ¶ 13.)

D. *Lack of Injury to Pennzoil*

137. Pennzoil has publicly admitted that Texaco's assets are sufficient to satisfy the Judgment even without liens or a bond.

(a) On November 22, 1985, J. Hugh Liedtke, Pennzoil's chairman, stated that Texaco's liquidation value would equal at least $22 billion, and that "he did not doubt Texaco's ability to pay the damages". (*See New York Times*, Nov. 22, 1985, Sec. D, p. 10.)

(b) In a television interview broadcast in Houston on December 5, 1985, Pennzoil's lead counsel, Joseph D. Jamail, stated:

> "Texaco's announced public assets are in excess of 23 billion dollars. And if—all they need do if they're so sure about their case, and they claim they can't post a bond, and that's not what the hearing is about, they've still got the Getty assets they took away from Pennzoil, they can post those as a—in lieu of a bond." (Affidavit of Francis P. Barron ("Barron Aff."), sworn to December 29, 1985, ¶ 3 and Exhibit 1 thereto.)

(c) In a television interview broadcast in Houston on December 6, 1985, Mr. Liedtke stated that "Texaco has 37

billion dollars in assets, appraised value of their assets". (Barron Aff. ¶ 4 and Exhibit 2 thereto.)

(d) In another television interview broadcast in Houston on December 6, 1985, Mr. Liedtke stated:

> "After paying off all the debts that they currently owe—some 11 billion dollars—they still have 26 billion and it's very adequate to cover what they owe us". (Barron Aff. ¶ 5 and Exhibit 3 thereto.)

138. As found above, full application of those provisions may likely force Texaco into bankruptcy or liquidation. (See ¶¶ 71-81, *supra*.) Such a bankruptcy or liquidation might significantly impair or delay Pennzoil's ability to recover the full amount of the Judgment.

139-142. [Deleted, see Rule 408 Fed. R. Evid, as irrelevant and privileged.]

So found as indicated except to the extent inconsistent with this Court's opinion and findings of even date.

SO ORDERED

White Plains, NY
January 10, 1986

/s/ CHARLES BRIEANT
U.S.D.J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7046, 86-7052

TEXACO, INC.,

Plaintiff-Appellee,

—v.—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

JUDGMENT—Dated February 20, 1986

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of February, one thousand nine hundred and eighty-six.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. LAWRENCE W. PIERCE
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

/s/ Edward J. Guardaro

EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TEXACO, INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant.

ORDER DENYING MOTION FOR RECALL OF MANDATE/CLARIFICATION, MODIFICATION OR PARTIAL STAY OF JUDGMENT

FILED—March 27, 1986

Pennzoil requests recall of the mandate, issued March 13, 1986, for a clarification, modification or stay of the judgment of this Court, entered February 20, 1986, so as to enable Pennzoil to seek relief in the Texas courts other than enforcement of the judgment.

By: /s/ Laurence H. Tribe/BSK
LAURENCE H. TRIBE

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ J. Edward Lumbard
/s/ Walter R. Mansfield
/s/ Lawrence W. Pierce
Circuit Judges

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7046, 86-7052

TEXACO, INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

NOTICE OF APPEAL—Dated March 21, 1986

PLEASE TAKE NOTICE that defendant-appellant Pennzoil Company hereby appeals to the Supreme Court of the United States from the final judgment entered by the United States Court of Appeals for the Second Circuit on February 20, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: New York, New York
March 21, 1986

LAURENCE H. TRIBE, ESQ.

By /s/ Laurence H. Tribe/BSK

307 Griswold Hall
Cambridge, Massachusetts 02138
(617) 495-1767

—and—

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Defendant-Appellant
Pennzoil Company

JOHN L. JEFFERS, JR.
G. IRVIN TERRELL
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

PAUL M. BATOR
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

JOSEPH D. JAMAIL
Jamail & Kolius
3000 One Shell Plaza
Houston, Texas 77002

Of Counsel

APPENDIX I

DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 84-05905

PENNZOIL COMPANY

Plaintiff,

—VS.—

TEXACO INC.,

Defendant.

JUDGMENT—Dated December 10, 1985

BE IT REMEMBERED that the above entitled and numbered cause came on for trial by jury before the 151st Judicial District Court, on the 9th day of July, 1985, and the trial thereof proceeded with the selection of a jury duly qualified, empaneled and sworn, the introduction of evidence and the taking of testimony until both sides rested and closed and so announced in open court; whereupon the Court duly charged and instructed the jury concerning all matters of fact submitted to the jury upon special issues, to which the jury unanimously made findings of fact in favor of plaintiff, Pennzoil Company, in all respects and against the defendant, Texaco Inc., which findings of the jury are set forth in the charge of the Court and verdict of the jury as heretofore received and filed by the Court, which charge and verdict are hereby incorporated in full as part and parcel of the Judgment of this Court as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive $110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least $5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7ths basis.

Answer: "We Do"

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Answer: "We Do"

SPECIAL ISSUE NO. 3

What sum of money, if any, do you find from a preponderance of the evidence would compensate Pennzoil for its actual damages, if any, suffered as a direct and natural result of Texaco's knowingly interfering with the agreement between Pennzoil and the Getty entities, if any?

Answer: "7.53 billion"

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Texaco's actions, if any, were intentional, willful and in wanton disregard of the rights of Pennzoil, if any?

Answer: "We Do"

SPECIAL ISSUE NO. 5

What sum of money, if any, is Pennzoil entitled to receive from Texaco as punitive damages?

Answer: "$3 billion"

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that at the end of the Getty Oil Company Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided that the Getty Oil Company would purchase the Museum shares forthwith as provided in the "Memorandum of Agreement"?

Answer: "We Do"

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that at the end of the Getty Oil Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided for Pennzoil to have an option to purchase 8 million shares of Getty Oil Company stock as provided in the "Memorandum of Agreement"?

Answer: "We Do"

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the payment of $110 in cash per share plus the ERC stub was not a fair price as of January 3, 1984?

Answer: "It was a fair price."

Plaintiff having moved the Court for entry of judgment on the verdict and the Court having considered such motion together with all opposing motions and arguments of counsel for the defendant with respect thereto, it is hereby ordered, judged and decreed that plaintiff's Motion for Judgment on the Jury Verdict be and the same is hereby granted and that the Judgment of this Court is as follows:

1. Plaintiff, Pennzoil Company, shall have and recover of and from the Defendant, Texaco Inc., the sum of Seven Billion, Five Hundred and Thirty Million Dollars ($7,530,000,000.00) as its actual damages; and

2. In addition to the foregoing, Plaintiff, Pennzoil Company, shall have and recover from Defendant, Texaco Inc., the sum of Six Hundred Twenty-Four Million, Seven Hundred Fifty-Three Thousand, Six Hundred Sixty-Two Dollars ($624,753,662.00) as prejudgment interest on the recovery outlined in paragraph 1 above, less the offset in paragraph 4 below, calculated under New York law at the simple rate of nine percent (9%) per annum beginning January 6, 1985, to and including December 9, 1985; and

3. In addition to the foregoing, Plaintiff, Pennzoil Company, shall have and recover of and from Defendant, Texaco Inc., the sum of Three Billion Dollars ($3,000,000,000.00), as punitive damages; and

4. In addition, the total award to Pennzoil set out in paragraphs 1, 2 and 3 above shall be reduced by Thirty-Three Million, Seven Hundred and Seventy-Seven Thousand, Five Hundred and Fifty-One Dollars and Seventeen Cents ($33,777,551.17), pursuant to the terms of the stipulation entitled Admissions of Pennzoil Company filed in this case; and

5. The total sum of the judgment hereby granted Plaintiff, Pennzoil Company, against Defendant, Texaco Inc., being the sum of awards set out in paragraphs 1, 2 and 3 above, after allowance for the reduction set

out in paragraph 4 above, is Eleven Billion, One Hundred Twenty Million, Nine Hundred Seventy-Six Thousand, One Hundred Ten Dollars and Eighty-Three Cents ($11,120,976,110.83). In addition, Plaintiff, Pennzoil Company, shall have and recover from the Defendant, Texaco Inc., postjudgment interest on said total sum of judgment at the simple rate of ten percent (10%) per annum from the date of judgment until paid; and

6. It is further ordered, judged and decreed that all costs incurred will be taxed against the Defendant, Texaco Inc.; and

7. In order to preserve the status quo of this proceeding during the pendency of this matter before this Court, the Court hereby ORDERS AND DECREES as follows:

   (a) Pennzoil shall not abstract, or request, or attempt to file any abstract of Judgment in this matter or file, register, levy or execute thereon or otherwise attempt to collect the Judgment in the State of Texas or elsewhere by reason of this Judgment by this Court in the matter without permission of this Court.

   (b) Texaco shall not pledge, encumber, convey, or otherwise dispose of any of its assets other than in the routine and ordinary course of business without permission of this Court. Financing involving sale or pledges of receivables or inventory are agreed to be in the ordinary course of business.

   (c) Texaco shall keep intact and not encumber, except in the routine and ordinary course of business, any of the properties and assets now owned by Texaco which were formerly owned by Getty Oil Company and its affiliate entities without permission of this Court.

   (d) If Pennzoil is found, after notice and hearing, to have violated this paragraph 7, Texaco shall be granted a new Trial.

(e) If Texaco files a petition under Title 11 of the U.S. Code, or if Texaco after notice and hearing is found to have violated this paragraph 7, then this paragraph 7 shall be of no further force or effect.

(f) No modification or vacation of this paragraph 7 shall be made except upon reasonable notice and hearings, and signed Order in the presence of both parties in open court.

(g) This paragraph 7 shall remain in effect and binding upon Texaco and Pennzoil so long as this matter is within the jurisdiction of this Court.

SIGNED AND ENTERED this 10th day of December, 1985 at Houston, Harris County, Texas, as the Judgment of the Court in this cause.

/s/ SOLOMON CASSEB, JR.
Solomon Casseb, Jr.,
Judge Presiding

The parties hereto agree to and approve the above paragraphs 7(a) through (g).

[signatures of parties]

APPENDIX J

DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 84-05905

PENNZOIL COMPANY,

Plaintiff,

—v.—

TEXACO INC.,

Defendant.

PENNZOIL STIPULATION—Dated December 20, 1985

Pennzoil Company, plaintiff in this action, hereby presents the Court the following stipulation concerning the judgment the Court entered in this action on December 10, 1985:

> "Pennzoil stipulates and agrees that, if Texaco seeks to supersede or stay the enforcement of this judgment and it makes provisions to secure the judgment which the Texas courts determine would meet the standards of Fed. R. Civ. P. 62, Pennzoil will be bound by any stay that the Texas courts enter based on a finding that Texaco has provided security which meets the standards of Fed. R. Civ. P. 62."

WHEREFORE, Pennzoil requests that the Court accept this stipulation.

Respectfully submitted,

BAKER & BOTTS

By/s/ JOHN L. JEFFERS

John L. Jeffers
TBA #10603000
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1360

APPENDIX K

ARTICLE 1, SECTION 13 OF THE TEXAS CONSTITUTION

provides in relevant part:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

APPENDIX L

TITLE 42, SECTION 1983 OF THE UNITED STATES CODE

§ 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX M

TITLE 28, SECTION 1257 OF THE UNITED STATES CODE

§ 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX N

TEXAS GOVERNMENT CODE

§ 22.002. *Writ Power*

(a) The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.

* * * *

APPENDIX O

RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 62. *Stay of Proceedings to Enforce a Judgment*

(a) *Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of

the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) *Stay in Favor of the United States or Agency Thereof.* When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

(f) *Stay According to State Law.* In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) *Power of Appellate Court Not Limited.* The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) *Stay of Judgment as to Multiple Claims or Multiple Parties.* When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(2)

No. 85-1798

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

PENNZOIL COMPANY,

Appellant,

–against–

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

THOMAS D. BARR
DAVID BOIES*
MAX R. SHULMAN
FRANCIS P. BARRON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN*
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

May 31, 1986

*Counsel of Record

2 7 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.	v
STATEMENT OF THE CASE	1
ARGUMENT	9
A. The Second Circuit's Due Process Holding Does Not Merit Plenary Review	9
B. The Second Circuit's State Action Holding Does Not Merit Plenary Review	14
1. The Second Circuit's decision is well within *Lugar*	15
2. The Second Circuit's decision does not affect the Anti-Injunction Act	19
3. The Second Circuit's decision does not offend the constitutional policies that underlie the state action doctrine	19
C. The Second Circuit's *Younger* Holding Does Not Merit Plenary Review	21
1. The narrow federal relief at issue does not implicate a "vital" state interest	21
2. Texaco lacked a practical remedy in the Texas state courts	25
D. The Second Circuit's Subject Matter Jurisdiction Holding Does Not Merit Plenary Review	27
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
CASES:	
Archer v. Bill Pearl Drilling Co., 655 S.W.2d 338 (Tex. App. 1983)	16
Davis v. Scherer, 104 S. Ct. 3012 (1984)	14
Dennis v. Sparks, 449 U.S. 24 (1980)	17, 18, 19
Diamond v. Charles, 54 U.S.L.W. 4418 (U.S. April 30, 1986)	8
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	27, 28, 29
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	2
Douglas v. California, 372 U.S. 353 (1963)	10
Evitts v. Lucey, 105 S. Ct. 830 (1985)	7, 10, 11
Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960)	16
Glenn v. Hollums, 73 S.W.2d 1068 (Tex. Civ. App. 1934)	27
Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)	29
Haring v. Prosise, 462 U.S. 306 (1983)	29
Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	7, 13
Hernandez v. Finley, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)	26
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	23, 29
Juidice v. Vail, 430 U.S. 327 (1977)	21, 23, 24, 29
Kantor v. Herald Publishing Co., 632 S.W.2d 656 (Tex. App. 1982)	16
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	10
Louisville & Nashville R.R. v. Stewart, 241 U.S. 261 (1916)	12
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	15, 16, 17, 18, 19, 20, 21
Mathews v. Eldridge, 424 U.S. 319 (1976)	11

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 21

Migra v. Warren City School District, 465 U.S. 75 (1984) 29

Mitchum v. Foster, 407 U.S. 225 (1972) 22, 24

Moore v. Sims, 442 U.S. 415 (1979) 21, 22, 26

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 29

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 13

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) 12

Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. 1980) 27

Renger v. Jeffrey, 182 S.W.2d 701 (Tex. 1944) 16

Shell Petroleum Corp. v. Grays, 62 S.W.2d 113 (Tex. Com. App. 1933) 16

Svoboda v. Alexander, 3 S.W.2d 423 (Tex. Com. App. 1928) 27

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985) 29

Williams v. Oklahoma City, 395 U.S. 458 (1969) 10

Younger v. Harris, 401 U.S. 37 (1971) 8, 21, 22, 24, 25, 26, 29

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Fourteenth Amendment . 1, 10, 18

STATUTES AND RULES:

United States

28 U.S.C. § 1254(2) 1, 14

28 U.S.C. § 1257 5

28 U.S.C. § 2283 .... 15, 19

28 U.S.C. § 2403(b) 1, 20

42 U.S.C. § 1983 .... 7, 18, 19, 20, 22

Fed. R. Civ. P. 62 5

	Page
New York	
N.Y. Civ. Prac. Law § 5519(c)	14
Oregon	
Or. Rev. Stat. § 19.045	14
Texas	
Tex. Civ. Prac. and Rem. Code § 65.013	27
Tex. Prop. Code Ann. § 52.001	2
Tex. R. Civ. P. 324	27
Tex. R. Civ. P. 364	1, 4, 5, 27
Tex. R. Civ. P. 627	1
Virginia	
Va. Code § 8.01-676.1	14

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
S. A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Canadian Reserve Oil and Gas Ltd.

Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

STATEMENT OF THE CASE

Pennzoil has appealed, pursuant to 28 U.S.C. § 1254(2), from a judgment of the United States Court of Appeals for the Second Circuit, affirming the grant of a preliminary injunction against application of certain Texas state security provisions on the ground that, in "the unique and extraordinary circumstances of this case" (A35), application of those provisions raises serious questions under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (A43-44).[1] The State of Texas, whose statutes are at issue, intervened as a party in the district court pursuant to 28 U.S.C. § 2403(b) and separately appealed to the Second Circuit (A4 n.1), but has not appealed to this Court.

Pennzoil's Jurisdictional Statement largely ignores the following *undisputed* facts which show why Texaco was compelled to seek relief in the federal courts and why that narrow relief was properly granted:

(1) On December 10, 1985, a trial court in Texas entered a money judgment against Texaco (the "Judgment") in the unprecedented amount of $11.12 billion (A6)—over 40 times larger than the largest private civil judgment ever upheld in any prior case of any kind.

(2) Under Tex. R. Civ. P. 364(b) and 627, a money judgment is enforceable by execution 30 days after entry (or, if a new trial motion is made, 30 days after its denial), unless the judgment debtor has secured a stay of execution by posting a supersedeas bond in "at least the amount of the judgment, interest and costs". (A8 & n.4, A86) The amount of the bond is fixed by law; Texas courts have no discretion to vary it. (A9-10)[2]

---

[1] Citations in the form "A___" refer to pages in the Appendices attached to Pennzoil's Jurisdictional Statement. Citations in the form "JS___" refer to pages in Pennzoil's Jurisdictional Statement.

[2] If a supersedeas bond is not posted, a writ of execution is obtained by *ex parte* application to the court clerk, the writ is presented by the judgment creditor to the county sheriff, and the sheriff executes it. (A25-26)

(3) Even if a supersedeas bond is posted, Tex. Prop. Code Ann. §§ 52.001 *et seq.* permits a judgment creditor to place liens upon a judgment debtor's real property in Texas immediately upon entry of judgment. (A25-26, A8-9; JS 2) There is no authority under Texas law for staying attachment of such judgment liens.[3]

(4) Under the bond provisions, to obtain a stay of execution of the Judgment pending appeal, Texaco would have had to post a bond in excess of $12 billion. (A8) Neither Texaco nor any other company could have posted such a bond since "the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances". (A9)[4]

(5) Without a supersedeas bond, Pennzoil could have executed the Judgment, and the "attachment of a lien . . . on Texaco's real property in Texas, valued at $5 billion, would [have] seal[ed] the company's fate", forcing Texaco "into bankruptcy or liquidation". (A39-40) As a result, Texaco's ability to pursue an effective state court appeal from the Judgment—an appeal guaranteed by the Texas Constitution and raising serious questions under both the federal Constitution and state law (A42)—would have been destroyed. The damage caused to Texaco would have been "immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits". (A44)[5]

(6) Application of the lien and bond provisions would also have adversely affected the national economy and national

---

[3] Judgment liens are obtained by *ex parte* application to the court clerk, who furnishes an abstract of judgment which the judgment creditor delivers to county recorders in counties where the judgment debtor's real property is located. The county recorders then index and file the abstract, thereby perfecting the lien. (A25-26)

[4] Similarly, although Texaco has a liquidation value in excess of $22 billion (A39), it could not possibly have posted $12 billion in cash or cash equivalents and "still retain[ed] sufficient liquid assets to operate its business" (A9; *see also* A39); nor, because of the terms of its unsubordinated indebtedness, could it have possibly borrowed $12 billion by mortgaging or pledging its assets (A9).

[5] *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (the possibility of bankruptcy "[c]ertainly . . . meets the standard for granting interim relief, for otherwise a favorable final judgment might well be useless").

security.[6] The extent of the public harm threatened by premature enforcement of the Judgment was attested by the fact that "some 58 interested parties including 12 states . . . filed amicus briefs or other papers [in the Second Circuit] urging that enforcement be enjoined". (A40)

(7) Upon the consent of both Pennzoil and Texaco, Paragraph 7 was inserted into the Judgment, barring Pennzoil from enforcing the Judgment for the limited remaining time the trial court retained jurisdiction, so long as Texaco satisfied certain conditions.[7] Pennzoil refused to agree to further relief and took the position (correct under Texas law) that the court was powerless to give any relief without Pennzoil's consent. (A7, A8, A103)

(8) Despite Paragraph 7, in the week after entry of the Judgment Texaco's financial condition rapidly deteriorated, to the point that the company was driven to the brink of bankruptcy. (A10, A90-101)[8] Texaco's bonds were downgraded by

---

[6] If Texaco had been forced into liquidation or bankruptcy, a large percentage of Texaco's 55,000 employees world-wide, with an annual payroll of $1.6 billion, would have lost their jobs; and approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would have suffered heavy losses. (A40) In addition, "the inability of Texaco to function in a normal manner" would have "adversely affect[ed] this country's balance of payments", made "this country's oil supply less secure", impaired the "ability to supply military forces" around the world, and "could [have] prompt[ed]" other foreign actions "harmful to the national security or foreign policy of the United States". (A112-13)

[7] Under Texas procedure, the expiration of the trial court's jurisdiction (and, thus, of Paragraph 7's terms) could have occurred at the earliest on February 8, 1986, and at the latest on March 25, 1986. (A89)

[8] For at least two reasons, Paragraph 7 failed to stop Texaco's financial deterioration. *First,* lenders and suppliers knew that Paragraph 7 would expire in a short period of time, after which Pennzoil could attach or execute on Texaco's property. *Second,* there was reluctance to deal with Texaco because of uncertainty over whether particular transactions were permitted under Paragraph 7, which, *inter alia,* prohibited Texaco from engaging in transactions other than "in the routine and ordinary course of business". (A10, A90-101)

Pennzoil itself aggravated the situation by publicly threatening to undo whatever limited protection Paragraph 7 afforded. Specifically, Pennzoil's chairman warned that the company was " 'going to put pressure' " on the Texas trial court to permit attachment of liens unless Pennzoil was satisfied with Texaco's settlement proposals, and a Pennzoil director and "legal

Moody's from investment grade to non-investment grade; Texaco was forced to withdraw from the commercial paper market; banks with which it did business advised that they would no longer lend the company money on unsecured terms because of the "uncertainties" of Paragraph 7; potential joint venturers with Texaco cancelled negotiations because of similar uncertainties; suppliers refused to do business with the company on regular and customary terms; and companies refused to negotiate routine deals for the purchase of Texaco assets. (A10, A40)

(9) Because of the severity of Texaco's financial crisis, on December 13, 1985, Texaco requested an emergency conference with the Texas trial court. The trial court at first responded favorably, but later refused to hold a conference when Pennzoil objected. Pennzoil in fact took the position that it would never agree to such a conference. (A10, A101-02)

(10) Without Pennzoil's consent, the only other possible avenue of relief in Texas from application of the lien and bond provisions was a constitutional challenge brought on "by motion and mandamus". (A10) Such a challenge—uncertain at best[9]—could not have provided Texaco with "adequate and timely" relief. (A10, A37) When Texaco sought its federal injunction, "time [was] of the essence" (A35)—the company was literally within days of bankruptcy. To pursue mandamus in Texas would have required Texaco to expend "precious time" (A37)—time it did not have—requesting the Texas trial

---

strategist" charged Texaco with violating the "standstill" provisions of Paragraph 7 "by providing letters of credit from its bankers in purchasing products and services" —a clear threat to have the "standstill" lifted. (A46, A105)

[9] According to the State of Texas in the court below, for mandamus to lie, "[t]he applicant *must* have a *clear right* to the performance of the act requested" and "[t]he target of the writ *must* have a *clear duty* to perform the act". (Brief of the State of Texas, Intervenor-Appellant ("Tex. Br.") at 32 n.10; emphasis added) To the extent there was a "clear right" and "clear duty" here, it was the right of Pennzoil, under the mandatory provisions of Tex. R. Civ. P. 364(b), to execute its Judgment absent a full supersedeas bond, and the duty of the Texas state courts not to grant a stay of execution absent such a bond.

court, in the first instance, to disregard the plainly non-discretionary dictates of Rule 364(b); then filing a mandamus petition with the Texas appellate courts; if successful on that petition, engaging in further remand proceedings; and if unsuccessful, petitioning this Court under 28 U.S.C. § 1257. (A38)[10]

(11) Against the devastation which would have been caused to Texaco, application of the lien and bond provisions was wholly unnecessary to protect any legitimate Pennzoil interest. As the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full". (A45-46)[11]

(12) Given Pennzoil's conceded lack of need for security and the conceded seriousness of the questions raised by Texaco's state court appeal, it is likely, as the Second Circuit

---

[10] The "stipulation" offered by Pennzoil *after* Texaco had instituted its federal suit—under which the Texas trial court would apply the standards of Fed. R. Civ. P. 62 in determining the security required of Texaco pending appeal (A129-30)—"d[id] not solve the problem Texaco face[d] in this action". (A48) The "stipulation" purported to confer upon the Texas trial court discretionary power that (a) the Texas legislature and appellate courts have expressly withheld, (b) the trial court had shown no inclination to use (in fact, had avoided even a conference to discuss), and (c) the Texas courts have no experience in exercising (indeed, as to which their entire tradition is to the contrary). (A48-49) Further, Pennzoil counsel represented to the district court that, if Pennzoil were to proceed in Texas under the "stipulation", it would insist on a bond equal to "the full value of the Judgment". (Transcript of Hearing before Hon. Charles L. Brieant, Jan. 9, 1986, at 64; *see also* A48) Had the Texas trial court not set such a bond, presumably Pennzoil would have appealed in the Texas state courts. As a result, the "stipulation" simply added to the financial and business community's justified apprehension and confusion over Texaco's continued viability.

[11] Texaco's appraised net worth as of December 31, 1984, was in excess of $22.6 billion; Pennzoil itself estimated that Texaco had assets far greater than necessary to satisfy the Judgment; Pennzoil's chairman publicly conceded that " 'he did not doubt Texaco's ability to pay the damages' "; and there was "no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the normal course of business or that it would transfer any of its assets to defraud Pennzoil". (A46-47) Moreover, Pennzoil has *never* challenged the adequacy of the $1 billion bond set by the district court and has *never* sought to avail itself of the procedures explicitly established by that court (and approved by the Second Circuit) to increase the security if circumstances change. (A53-55)

noted, that "[Pennzoil's] pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal". (A46)[12]

From the above undisputed factual record, several points emerge which demonstrate why Pennzoil's appeal does not merit plenary review by this Court. None of those points is evident from Pennzoil's Jurisdictional Statement.

First, Texaco did not seek—and the courts below did not sanction—a constitutional requirement of "an affordable stay of judgment pending appeal". (JS i) The narrow ruling below is simply that when the application of lien and bond provisions, which are impossible for a judgment debtor to satisfy and unnecessary to protect any legitimate interest of a judgment creditor, prevents a defendant from effectively exercising a state guaranteed right to appeal, that application raises a due process

---

[12] Indeed, the same can be said of the motivation behind the instant appeal. On February 21, 1986, the day after the Second Circuit's decision, Pennzoil's chairman was reported in the *New York Times* as saying that "Pennzoil probably would not appeal the latest ruling", and that the result below was "a step in the right direction" (*New York Times,* February 21, 1986, section D at 1, col. 6); and he was reported in *The Wall Street Journal* as saying that the Second Circuit's affirmance did not "hurt [Pennzoil] at all" and "actually helps" (*The Wall Street Journal,* February 21, 1986, at 3, col. 2). In light of those statements, the only plausible explanation for Pennzoil's current appeal is to keep settlement pressure on Texaco.

And, Pennzoil's tactic appears immediately to have had its intended effect. On March 25, 1986—four days after Pennzoil filed its notice of appeal—*The Wall Street Journal* reported that Moody's, reversing its prior position, had decided that "a possible upgrading of Texaco's commercial paper rating will have to await the outcome of Pennzoil's court effort to have the standstill extended, as well as the outcome of its move to take the appeals court decision to the U.S. Supreme Court". (*The Wall Street Journal,* March 25, 1986, at 7, col. 1) The same day, *The Wall Street Journal* quoted Joseph D. Jamail, Pennzoil's lead counsel, as stating that "[a]ny banker that loans money to [Texaco] now is a lunatic". *Id.*

question sufficiently substantial to support a preliminary injunction.[13] Such relief is particularly warranted where, as here, the defendant's state court appeal presents serious challenges to the underlying judgment not only under state law, but under the laws and Constitution of the United States as well.[14] Pennzoil cites no case to the contrary.

Second, Texaco did not seek—and the courts below did not sanction—a rule which, for Section 1983 purposes, transforms into "the state" every state court judgment winner. (JS 10-11) State action is involved here not because Pennzoil was the "winning" party in Texas or because it obtained a judgment in the Texas trial court, but because, prior to final (and preclusive) adjudication of its claims, Pennzoil could invoke (and control) the unsupervised power of state officials to aid in the attachment, seizure and sale of Texaco's property, and because Texaco asks that this joint activity be enjoined on constitutional grounds.

Third, Texaco did not seek—and the courts below did not sanction—a result which amounts to review or modification of Pennzoil's Judgment or which ousts the Texas state courts from their unfettered ability to rule on the merits of the *Pennzoil v. Texaco* lawsuit. All the injunction below does is preserve Texaco's ability to pursue an effective appeal in the Texas state courts, and that appeal is moving forward right now.[15]

Fourth, Texaco did not seek—and the courts below did not sanction—interference with any on-going state court proceeding, and certainly not interference with a state court proceeding in which Texas has a "vital" interest sufficient to justify federal

---

[13] *See Evitts v. Lucey,* 105 S. Ct. 830, 838 (1985).

[14] *See Henry v. First Nat'l Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980).

[15] On April 23, 1986, Texaco filed its appeal brief in the Texas Court of Appeals challenging the Judgment on 90 separate state and federal grounds, based on both substantive and procedural errors committed by the Texas trial court. The appeal is scheduled for argument and submission on July 31, 1986.

court abstention under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971). Pennzoil's lawsuit against Texaco in Texas is a purely private dispute involving purely private parties, and the State of Texas expressly represented in the court below that it has "no interest in the outcome" of that dispute. (Tex. Br. at 2) Further, by its "stipulation", Pennzoil has purported to replace the Texas lien and bond provisions with *federal* procedures, thus suggesting that Pennzoil itself does not believe a "vital" state interest is implicated here. (JS 2, 17 n.10; A48)[16]

Fifth, the present action was filed in response to an imminent threat of irreparable harm to Texaco (and to the public interest) which could not have been averted by "adequate and timely" state court procedures. (A37) Under *Younger* itself, abstention is inappropriate in such exigent circumstances.

Sixth, the ruling below, far from creating a "yawning breach" (JS 6) or "capacious zone" (JS 7) or "ominous gap" (JS 16) in rules of federalism and comity, is extremely narrow. As the Second Circuit noted, the "extraordinary circumstances of this case . . . are unlikely ever again to recur". (A50) Those circumstances include: a concededly impossible bond requirement which local provisions gave state courts no discretion to modify or suspend; a conceded lack of need for security by the judgment creditor; the imminent destruction of a state guaranteed right to appeal in a purely private civil litigation raising serious federal and state issues; a putative state court mandamus remedy that was uncertain at best where no uncertainty could be tolerated; a request for federal relief which preserved rather than truncated state appellate power; and the distinct possibility that Pennzoil was deliberately threatening to use local officials and security procedures, not to make itself more secure as a judgment creditor, but to pressure Texaco to settle

[16] Moreover, as mentioned above, Texas has not separately appealed the Second Circuit's narrow ruling. *Compare Diamond v. Charles,* 54 U.S.L.W. 4418, 4421 (U.S. April 30, 1986).

the state court action prior to any appeal. (A46, A50, A105-106)[17]

ARGUMENT

None of the issues raised by Pennzoil merits plenary review by this Court. Accordingly, the ruling below should be summarily affirmed.

A. The Second Circuit's Due Process Holding Does Not Merit Plenary Review.

Because the Second Circuit's "narrow" ruling on Texaco's due process claim is correct in the "unique and extraordinary circumstances of this case" (A35; A50), it does not merit this

[17] By an amazing deluge of rhetoric, Pennzoil seeks to divert attention from what really happened below. Pennzoil accuses the Second Circuit of "opening a yawning breach in the walls of statutes and judicial doctrines" governing federal/state relations (JS 6); of "constructing a contrived complex of exceptions to . . . comity rules" (JS 7); of "creat[ing] a capacious zone within which comity is simply inapplicable" (JS 7); of "creat[ing] a no-man's land" within which comity rules are inoperative (JS 8); of creating "a jurisdictional darkling plain where litigants shanghaied from state courts clash by night" (JS 8); of "providing . . . a privileged entree" to federal courts for litigants wishing to "deliberate[ly] bypass" or "side-swip[e] on-going state court proceedings" (JS 8); of "drastically erod[ing]" and "cannibaliz[ing]" the Anti-Injunction Act (JS 12); of creating "a large and wholly unjustified zone" within which state proceedings can be enjoined (JS 12-13); of "creat[ing] a zone within which *all* rules of comity are rendered entirely inoperative" (JS 14; emphasis in original); of "creat[ing] an ominous gap in fundamental principles of comity" (JS 16); of "ma[king] nonsense of the law" (JS 14); of "gutt[ing]" the rules of abstention based on "a series of distrustful speculations" and "abstract and hostile speculations" (JS 16, 19); of "allow[ing] litigants to assemble jurisdictional sandwiches to suit their tastes" (JS 20); of "creat[ing] a looking-glass inversion of federalism" (JS 22); of "executing an end-run around the state courts" (JS 22); of "re-plac[ing] federal comity with an *anti*-comity principle" (JS 22-23; emphasis in original); of reaching a "topsy-turvy result" (JS 23); of opening the door to "wide-scale evasions of this Court's comity rulings" (JS 28); of offering litigants "a fielder's choice" between state and federal forums (JS 28); of giving litigants "free[dom] to roam across jurisdictional borders" (JS 29); and of "fundamentally alter[ing] the jurisdictional landscape" (JS 29). That onslaught of alarmist verbiage hardly describes the Second Circuit's decision.

Court's plenary review. Pennzoil ignores those circumstances—all of which are *undisputed.*

As Pennzoil would have it, the Second Circuit ruled that "a judgment debtor has a Fourteenth Amendment right to an affordable bond". (JS 5) Nothing the Second Circuit said or did justifies that sweeping characterization. On the contrary, the Court of Appeals' "narrow holding" (A35, A51) was carefully limited to a situation (1) where the posting of a mandatory $12 billion bond was "impossible" not just for Texaco, but for any judgment debtor (A35); (2) where the "inflexible" operation of a state's non-discretionary lien and bond provisions would render the judgment debtor's guaranteed right to appeal "an exercise in futility" by "irrevocabl[y]" destroying it prior to any appellate review (A24, A44); and (3) where the provisions' unmitigated application was "unnecessary" to protect the judgment creditor pending appeal and thus bore no rational relationship to the state's purpose in enacting them (A24, A34-35, A44).

Pennzoil concedes the controlling Fourteenth Amendment principle which mandates summary affirmance in these circumstances—that once a state such as Texas guarantees a right to appeal, "the Constitution foreclose[s] the option of limiting the right. . .by *irrational or arbitrary requirements*". (JS 24; emphasis added)[18] And yet, having paid lip service to this principle, Pennzoil utterly fails to explain why application of the lien and bond provisions in the circumstances of this case does not irrationally deprive Texaco of its right to appeal—an appeal raising "non-frivolous" federal and state issues (A42)—given the undisputed fact that such application is "unnecessary" to protect Pennzoil pending appellate review.[19]

---

[18] As this Court said just last term in *Evitts v. Lucey,* 105 S. Ct. 830, 838 (1985), "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms". *See also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30 & n.5 (1982); *Williams v. Oklahoma City,* 395 U.S. 458, 459-60 (1969); *Douglas v. California,* 372 U.S. 353, 357-58 (1963).

[19] Pennzoil ignores this latter undisputed fact, which limits the scope of the Second Circuit's due process ruling. How often, for example, will a "'Mom-and-Pop' grocery store" (JS 27) be unable to post security for a

In an attempt to avert summary affirmance, Pennzoil offers several arguments, none of which is availing.

First, Pennzoil contends that "Texas has *not* limited Texaco's appeal rights" because the prosecution of an appeal in Texas is not expressly conditioned upon compliance with the state's supersedeas bond requirement. (JS 24; emphasis in original) That, of course, exalts form over substance. The court below found, as a matter of undisputed fact, that operation of the lien and bond provisions in this case would "render [Texaco's] right to appeal in Texas an exercise in futility" (A24)—a "meaningless ritual" —by "robb[ing] [it] of any effectiveness" (A43-44).

Second, Pennzoil contends that "there is nothing irrational in Texas' decision to safeguard fully the interests of those who have won judgments in Texas courts". (JS 25) But no one is arguing otherwise. Texaco's due process claim does *not* attack the *facial* validity of the lien and bond provisions and thus does *not* question that the state had a rational and legitimate purpose in enacting those statutes. Rather, Texaco's claim is that *application* of the provisions would be irrational in "the unique and extraordinary circumstances of this case" (A35), because Texaco's right to appeal would be eviscerated without advancing the state interest at issue (A34-35).

Third, Pennzoil contends that Texaco has already been accorded sufficient "due process" by the supposedly "full and fair" Texas trial which produced, by orders of magnitude, the largest civil judgment in United States legal history. (JS 23) But that argument ignores this Court's teaching in *Evitts* that once a state provides a right to appeal, that right cannot be limited or withdrawn without comporting with "applicable due process norms". 105 S. Ct. at 838. States such as Texas guarantee a right to appeal precisely because they recognize that trial court adjudication carries a significant "risk of an erroneous deprivation".[20] And here, as the Second Circuit

---

judgment but have assets so substantially in excess of the judgment that the judgment creditor itself publicly concedes that security pending appeal is *unnecessary*? In how many of *those* cases will local courts have *no* discretion to tailor security to need? *(See infra* at n.25)

[20] *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

found, it is "clear" that Texaco "has raised non-frivolous issues as the basis for its Texas appeal". (A42) It would be the height of irrationality if the interim and *unnecessary* enforcement of an *erroneous* trial court judgment irrevocably destroyed Texaco before the appellate courts had the opportunity to resolve its meritorious appeal.[21]

Fourth, Pennzoil contends that the Second Circuit's due process ruling "flies in the face of this Court's long-settled precedents". (JS 25-26) Yet, Pennzoil relies on only two cases to support its sweeping assertion (JS 24), and both are irrelevant.[22]

Fifth, Pennzoil contends that the Second Circuit's decision "threat[ens] ... the orderly administration of justice" in at least 30 states which purportedly have supersedeas bond statutes like Texas. (JS 26-27) But that dire forecast, obviously

---

[21] It is significant to note in this connection that the State of New York has recently filed an *amicus* brief in the Texas intermediate appellate court urging reversal of the Judgment on the ground that the Texas trial court's jury charge "substantially misstated the applicable New York caselaw". (Brief *Amicus Curiae* of the Attorney General of the State of New York, May 12, 1986, at 28)

[22] The issue in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), was whether due process was violated by a state court dismissal of the defendant's appeal from a $495,000 judgment for flouting repeated court orders that he deliver $295,000 of out-of-state assets to a receiver for safekeeping pending appeal—the only substantial assets the defendant owned. In sustaining the appeal's dismissal, this Court held only that a state court has "inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution", and that "[w]here the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration". *Id.* at 44. That has nothing to do with this case, particularly given Pennzoil's conceded lack of need for security and the complete absence of any evidence that Texaco would unreasonably encumber or fraudulently transfer its assets pending appeal. (A46-47)

Equally irrelevant is *Louisville & Nashville R.R. v. Stewart,* 241 U.S. 261 (1916). All this Court held there was that a state could add 10% to the amount of a judgment *if affirmed on appeal* as the cost of the judgment debtor's obtaining a supersedeas bond which suspended execution pending appeal. *Id.* at 263. Since there was no claim in *Stewart,* nor could there have been, that that requirement effectively rendered the defendant's appeal meaningless, that case does not even remotely resemble this one.

made to interest this Court in plenary review, is based on Pennzoil's misstatement of the Second Circuit's holding that a judgment debtor is constitutionally entitled to "an affordable bond". The Second Circuit's "narrow" ruling (A35), expressly limited to a "unique" and "extraordinary" set of circumstances "unlikely ever to recur" (A35, A50), threatens no more disruptive effect on state supersedeas requirements than the Fifth Circuit's similarly "narrow" decision seven years ago in *Henry v. First Nat'l Bank of Clarksdale,* 595 F.2d 291, 301 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980). (A51)[23]

There is no indication that any of the states whose interests Pennzoil purports to be championing agrees with its doomsday prediction. On the contrary, nine of those states filed *amicus* briefs in the Second Circuit "urging that enforcement [of Pennzoil's judgment] be enjoined". (A40)[24] Alabama's position is illustrative:

> "The State of Alabama, like the State of Texas, has a supersedeas bond requirement and judgment lien statute, the purpose of which is to protect judgment creditors during the pendency of appeals, should they ultimately prevail. However, in this case, the unmitigated application

---

[23] In *Henry,* the Fifth Circuit held that where state law security provisions threaten to impair vital federal rights and interests by precluding meaningful appellate review of state court tort judgments, the federal courts can act to enjoin the state court plaintiff from invoking those security provisions, thereby preserving the right of state court and Supreme Court review and protecting the federal interests implicated. The narrow federal relief granted in *Henry* gave this Court an opportunity to undertake meaningful review of the local substantive law at issue there. Ultimately, this Court struck down that law, as applied, on the ground that it impermissibly burdened federally protected conduct. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982).

Like *Henry,* the present case involves a Judgment that, Texaco argues on appeal in Texas, will punish and deter conduct that federal constitutional and statutory law protects and encourages. Here, as in *Henry,* local lien and bond provisions threatened immediately to make that deterrent effect permanent and irrevocable by precluding meaningful state (and, if necessary, Supreme Court) review of the serious federal issues raised by the Judgment. Here, as in *Henry,* the federal courts possess both the power and the obligation to prevent such an intolerable result.

[24] The nine states are Alabama, Alaska, Delaware, Kansas, New Mexico, New York, Oklahoma, Washington and Wyoming.

of such provisions will destroy a judgment debtor before it has a meaningful opportunity to seek vindication through the state appellate system. We believe that an appropriate balance must be struck.

"We respectfully submit that [the district court] did just that in assuring Texaco's right to a meaningful appeal while providing Pennzoil with adequate security under Rule 65(c). It is no affront to state sovereignty for a federal court to guarantee a state court litigant a meaningful right to pursue its state court remedies." (Brief of Amicus Curiae The State of Alabama In Support of The District Court Preliminary Injunction, dated January 30, 1986, at 4-5)[25]

In sum, the Second Circuit's due process ruling does not merit plenary review by this Court.[26]

B. The Second Circuit's State Action Holding Does Not Merit Plenary Review.

Pennzoil contends that the Second Circuit's state action holding (1) "radically expands" the state action principles of

---

[25] It should also be noted that Pennzoil's 30-state head count is inaccurate. To begin with, Pennzoil itself admits that 16 of those jurisdictions "explicitly allow[ ] the trial court some equitable discretion to reduce the size of the bond". (JS 26 n.17) Three of the remaining fourteen states which Pennzoil counts as having non-discretionary full bonding requirements in fact expressly authorize courts to reduce the bond. (New York, N.Y. Civ. Prac. Law § 5519(c); Oregon, Or. Rev. Stat. § 19.045; Virginia, Va. Code § 8.01-676.1) These nineteen states, then, stand in marked contrast to Texas which, as the Second Circuit found, has a supersedeas requirement that is non-discretionary on its face and has "repeatedly been declared by Texas courts to be mandatory. . .". (A9)

As for the other eleven so-called non-discretionary jurisdictions, four have no reported decisions interpreting their supersedeas statutes as either discretionary or non-discretionary (Iowa, Arkansas, Michigan, Minnesota); and of the final seven states four appeared below as *amici* in support of the preliminary injunction against Pennzoil (A3; Alabama, Delaware, New Mexico and Oklahoma).

[26] Under 28 U.S.C. § 1254(2), the due process ruling is the *only* matter before this Court on direct appeal. As for the other issues raised by Pennzoil, this Court "retains discretion to decline to consider [them]". *Davis v. Scherer*, 104 S. Ct. 3012, 3017 n.7 (1984). For the reasons set forth in the remainder of this motion, those other issues do not merit this Court's consideration.

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (JS 10); and (2) "eviscerates" the Anti-Injunction Act (JS 9). Both contentions lack merit.[27]

1. **The Second Circuit's decision is well within *Lugar*.**

This Court's state action holding in *Lugar* turned on the presence of two factors. *First*, this Court relied on the presence of a "procedural scheme created by ... statute" that was "obviously ... the product of state action". 457 U.S. at 941. The specific scheme was a security procedure that balanced competing claims to disputed property pending trial by allowing attachment of property under certain circumstances. *Second*, this Court relied on the fact that, by invoking the state security provisions at issue, a private party triggered (and controlled) action by state officials. 457 U.S. at 941-42. As this Court explained, "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment". *Id.* at 941.

In finding state action in the instant case, the Second Circuit relied on precisely the same two factors that were dispositive in *Lugar*. *First*, as in *Lugar*, there is here a procedural scheme created by statute that is obviously the product of state action. (A24) That scheme (described *supra* at 1-2) involves security provisions which, through attachment and supersedeas mechanisms, balance competing claims to disputed property pending appeal. *Second*, as in *Lugar*, a private party's invocation of the security provisions here would have triggered (and allowed the private party to control) action by state officials. (A25-26)

Pennzoil does not—and cannot—dispute that both *Lugar* and the decision below were based upon these same two predicates. Instead, Pennzoil contends that *Lugar* is not controlling here because it involved security provisions that operated pending resolution through *trial* of competing claims

[27] Significantly, Pennzoil did not see fit to argue the state action issue before the district court.

to disputed property, whereas the security provisions here operate pending resolution of such claims through *appeal.* (JS 10) Under Pennzoil's reading of *Lugar,* invocation of precisely the *same* security provisions—involving precisely the *same* kind and extent of official action—would properly involve state action pending initial adjudication through trial, but could never involve state action pending appeal, even though a judgment at that stage is non-final under state law and is subject to corrective review.[28]

Pennzoil is wrong. Pennzoil relies on three elements in *Lugar* which it claims are unique to the prejudgment context. In fact, each element is present here as well.[29]

First, Pennzoil stresses that the security procedures in *Lugar* allowed seizure of "*disputed* property". (JS 10; emphasis in original) That is no less true here. The state's decision to provide a process of appellate review—a decision that contemplates the need to correct error committed in the initial phase of adjudication—demonstrates that a live and important "dispute" continues with respect to the property at issue.[30]

---

[28] Texas law accords judgments no finality or preclusive effect until all appeals have been exhausted. *E.g., Glen Oaks Util., Inc. v. City of Houston,* 280 F.2d 330, 334 (5th Cir. 1960); *accord Archer v. Bill Pearl Drilling Co.,* 655 S.W.2d 338, 341 (Tex. App. 1983).

[29] Pennzoil also overlooks the fact that state action arising from invocation of a local security scheme can support a Section 1983 claim only when (as in *Lugar* and here) that claim challenges the constitutionality of the particular scheme (either on its face or as applied). *Cf. Lugar,* 457 U.S. at 941. Because of this required nexus, the state action ruling below, contrary to Pennzoil's assertion, cannot be used in other contexts to support "imaginative constitutional objections" to other "state procedural and structural rules governing the processing of litigation". (JS 8-9; *see also* JS 11, 28)

[30] It is precisely for that reason that Texas courts attribute to post-trial security procedures the underlying purpose of maintaining "the status quo". *Renger v. Jeffrey,* 182 S.W.2d 701, 702 (Tex. 1944); *Kantor v. Herald Publishing Co.,* 632 S.W.2d 656, 657-58 (Tex. App. 1982); *Shell Petroleum Corp. v. Grays,* 62 S.W.2d 113, 118 (Tex. Com. App. 1933). If, as Pennzoil claims, completion of what is only the *initial* phase of adjudication (when, under Texas law, judgments are non-final and non-preclusive) in fact suffices to "determine[ ] the relevant rights and liabilities" of the parties—so that the property at issue is no longer "disputed" (JS 10-11)—there would be no reason to maintain "the status quo".

Second, Pennzoil stresses that invocation of the security procedures in *Lugar* was "judicially *un*supervised". (JS 10; emphasis in original) That is also true here. The very thrust of Texaco's due process claim is that Texas law prevents trial courts from exercising *any* discretion or supervisory power over the invocation of security provisions pending appeal—and that trial-winners (such as Pennzoil) who have no need for security may therefore employ those provisions to preclude effective review on a wholly arbitrary basis.[31]

Citing *Dennis v. Sparks,* 449 U.S. 24, 28 (1980), Pennzoil contends that the Texas security procedures would not have been "judicially unsupervised" in this case, because attachment and execution would have come at the end of a "4½ month trial", involving "the independent judgment of the state judiciary". (JS 11 & n.5)[32] That proposition misses the point of the limited constitutional claim at issue here. The "independent [judicial] judgment" the Texas trial court exercised during the "4½ month trial" was confined to adjudicating the merits of Pennzoil's state law claims. In the present lawsuit, Texaco does not attack that "independent [judicial] judgment"—Texaco is doing that on appeal in Texas (and, if necessary, in this Court

---

[31] In fact, the Texas security procedures at issue in the instant case are *more* judicially unsupervised than the Virginia procedures at issue in *Lugar.* As this Court observed, under the Virginia statute, upon the *ex parte* filing of an affidavit alleging need, the petitioner's property was "sequestered ... although it was left in his possession", and "a hearing on the propriety of the attachment and levy was later conducted". 457 U.S. at 924-25. The attachment would be vacated by the state court upon a failure "to establish the statutory grounds for attachment". *Id.* at 925. In contrast, the Texas security procedures relating to money judgments make no provision for any pre-attachment showing of need, for any judicial review of need—either before attachment or after—or for any possibility of judicial vacatur upon a failure to establish need.

[32] In *Dennis,* this Court held that " 'merely resorting to the courts and being on the winning side of a lawsuit' does not make a private party into a state actor under § 1983". (JS 11) As the Second Circuit observed, *Dennis* bars such Section 1983 claims because:

> "in such case[s] the *independent judgment* of the state judiciary is called into play, and unless unusual circumstances are shown ... a private party cannot be charged with responsibility for a judicial decision." (A27-28; emphasis added)

by direct review from the Texas Supreme Court). The issue in the instant case is whether—given Pennzoil's conceded lack of need for the particular security provisions involved—Pennzoil should nonetheless be permitted to invoke those provisions to preclude corrective review. That is a question which the initial trial court adjudication of Pennzoil's claims could not (and did not purport to) address. Pennzoil overlooks this dispositive distinction.[33]

Third, Pennzoil stresses that the seizure of property prior to initial resolution of competing claims thereto involves the exercise of "awesome" power which should be subject to federal constitutional constraints. (JS 10) But the power, through seizure of property, arbitrarily to truncate the process of review that ultimately will determine the property's rightful ownership—the power at issue here—is no less "awesome" or deserving of constitutional limitations.[34]

The presence here of all elements that Pennzoil contends were essential to *Lugar* only makes clearer that this case falls well within the scope of that decision.[35]

---

[33] A different case might be presented if, contrary to fact, the Texas lien and bond provisions allowed for judicial discretion with respect to the need for security for money judgments and if, in the independent exercise of that discretion, a Texas court had denied Texaco relief from the provisions. In such circumstances, invocation of the provisions by Pennzoil would have been judicially supervised. That, however, is plainly not this case.

The above is also a complete answer to Pennzoil's suggestion that "the Second Circuit's theory" would allow federal lawsuits requesting "additional argument time before the Texas Court of Appeals" (JS 21 n.14) or stays pending appeal from state injunction decrees (JS 28 n.19). The constitutional problem involved in the instant case arises only in the rare circumstance—not present in the cases Pennzoil suggests—where state courts lack inherent equitable discretion to grant the desired relief.

[34] Indeed, this Court has expressly held that the exercise of state power to preclude an appeal as of right must be and is subject to the constraints of the Fourteenth Amendment. (*See supra* at 10 n.18) As this Court observed in *Lugar,* Section 1983 "creat[ed] a remedy as broad as the protection that the Fourteenth Amendment affords the individual". 457 U.S. at 934.

[35] Pennzoil misconstrues the point of this Court's observation in *Lugar* that its holding was "limited to the particular context of prejudgment attachment". 457 U.S. at 939 n.21. (JS 10) The observation was made in specific response to a suggestion that *Lugar* altered the rule in *Dennis* that a private party does not become a state actor merely by instituting or prevailing

2. **The Second Circuit's decision does not affect the Anti-Injunction Act.**

Pennzoil contends that the Second Circuit's holding so expands the Section 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283, that it "drastically erodes", indeed "cannibalize[s]", the Act. (JS 12)

Pennzoil is wrong. A ruling that a particular private party is a state actor has *no* impact on the breadth of the Section 1983 exception to the Anti-Injunction Act. If a state proceeding deprives the state court defendant of federally protected rights, thereby creating a *meritorious* Section 1983 claim, the state court defendant can always institute a Section 1983 injunction action against the state officials involved in the proceeding (who are clearly state actors under Section 1983), rather than against the private state court plaintiff. Such an action would not be barred by the Anti-Injunction Act, even if the private state court plaintiff were *not* itself deemed a state actor.

3. **The Second Circuit's decision does not offend the constitutional policies that underlie the state action doctrine.**

Under the decisions of this Court, the state action inquiry is guided by considerations of whether the private party charged "may *fairly* [be held responsible as] a state actor".[36] Whether imposing that responsibility is "fair" cannot be determined without assessment of the precise burdens such responsibility entails. Once that inquiry is undertaken, it is clear that the

---

in a state court litigation. The only limiting principle responsive to that suggestion turns on the distinction between (a) claims that attack the use by private parties of unsupervised security procedures to seize disputed property (which *Dennis* did not address, but which are present here and in *Lugar*), and (b) claims that attack attempts by private parties to employ the judicial process to resolve disputes (which *Dennis* forbids). It does not turn on the pre-trial vs. post-trial distinction that Pennzoil seeks to attribute to *Lugar*. The *Dennis* bar applies with equal force in both the pre-trial and the post-trial context. That is, critical to *Lugar's* limitation is the element of unsupervised attachment of disputed property, and not whether the attachment is pre-judgment or post-judgment.

[36] *Lugar*, 457 U.S. at 937 (emphasis added).

instant case, far from "expand[ing]" *Lugar* (JS 10), is significantly narrower than *Lugar* itself.

First, this is solely an injunction action, not a suit for damages. As the dissent in *Lugar* noted, it may be unfair to impose *damages* under Section 1983 where the only conduct charged is a private party's wholly innocent invocation, without notice or fault, of a seemingly valid state statute.[37] That concern, however, is not implicated where (as here) injunctive relief alone is sought. The only consequence of losing an injunction suit is that the federal defendant will be unable to invoke either an unconstitutional state statute or an otherwise constitutional state statute in an unconstitutional manner. That is hardly an unfair "burden". Moreover, unlike a damages award, it is a "burden" to which the private party would be no less subject even if the only available defendant were a state official.

In addition, fairness concerns may arise in damages actions because the threat of monetary loss leaves a private defendant charged as a state actor with no choice but to assume the burdens of defense.[38] Actions limited to injunctive relief do not pose such a threat.[39]

Second, in the instant case, unlike *Lugar,* the private party's invocation of state procedures would not have been wholly innocent or unwary. Pennzoil repeatedly disclaimed the need for security for its Judgment (*see supra* at 5 n.11), and was certainly aware that application of the lien and bond provisions would have had an irrevocably destructive impact on Texaco. Hence, Pennzoil's only reason for resorting to the local security provisions would have been to preclude appellate review. That fact readily distinguishes this case from others in

---

[37] 457 U.S. at 956 n.14 (Powell, J., dissenting).

[38] *See id.*

[39] Even where state officials are not initially named as defendants in an action challenging the particular application of a state statute, federal law requires that the state be notified and invited to intervene. 28 U.S.C. § 2403(b). The private defendant can then reap the benefits of defense without assuming any of the corresponding burdens. In the rare case, the state may determine that it should *not* defend the particular application at issue. However, where (a) a specific application of a statute is attacked as unconstitutional, (b) the state itself acquiesces in that attack, and (c) the private defendant's sole motivation for defending application of the statute is the desire to procure its benefits—rather than the need to avoid monetary liability—the "burdens" of defense are hardly unjustified.

which the private party invokes a "seemingly valid statute" wholly unaware that an infringement of rights may result.

In sum, the instant case falls well within *Lugar*. It certainly offers no reason to reassess this Court's settled state action doctrine.

C. The Second Circuit's *Younger* Holding Does Not Merit Plenary Review.

Pennzoil claims that the Second Circuit's decision "repudiates" the abstention doctrine this Court has developed under *Younger v. Harris*, 401 U.S. 37 (1971). (JS 13) In fact, the decision below merely declines to expand *Younger* in a manner unjustified by the "unique" and "extraordinary" circumstances of this case—including the fact that the limited federal relief preserves, rather than undermines, state court appellate power.

1. The narrow federal relief at issue does not implicate a "vital" state interest.

Under this Court's decisions, *Younger* abstention is warranted only when a state court action seeks to vindicate "vital state interests".[40] In each case decided under *Younger*, this Court has focused on the particular subject matter of the state court litigation—carefully explaining why that subject matter did in fact embody especially important public interests.[41] That repeated focus by this Court has made clear that the mere *pendency* of a state court proceeding—as opposed to the particular *subject matter* of the proceeding—does not supply the "vital" state interest required to justify abstention.

Pennzoil's lead *Younger* argument ignores this basic distinction. Pennzoil argues that it is a "contradiction in terms" to hold both (a) that state action is present (as necessarily is true any time some judicial action is taken in a pending state court lawsuit) and (b) that *Younger* absention is not warranted. (JS

---

[40] *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

[41] *E.g., Middlesex County Ethics Comm.*, 457 U.S. at 434-35; *Moore v. Sims*, 442 U.S. 415, 434-35 (1979); *Juidice v. Vail*, 430 U.S. 327, 335-36 & n.12 (1977).

14) That is so, Pennzoil contends, because state action under Section 1983 requires "the exercise of public power" and because the presence of such "*public* power" must itself trigger *Younger*. (JS 14; emphasis in original) Thus, according to Pennzoil, whenever state action exists for Section 1983 purposes, there is a "vital" state interest for *Younger* purposes. (JS 15).

Pennzoil in fact has things reversed. In the present context, a private party is considered a state actor for Section 1983 purposes only when the state has ceded to him the power to invoke and control, in an unsupervised manner, the conduct of state officials. That is *inconsistent* with a finding of a "vital" state interest. Under Pennzoil's theory, the less control the state exercises and the more control it abdicates to private parties, the more "vital" its interest.

If Pennzoil's argument were correct—and it is not—it would automatically extend *Younger* to " 'every pending proceeding between a State and a federal plaintiff' ", a result "not remotely suggest[ed]" by this Court's prior decisions[42]—indeed, it would, contrary to Pennzoil's disclaimer (JS 14 n.8), automatically extend *Younger* to all " 'purely' private" civil state court lawsuits.[43] Pennzoil's theory would also (a) mechanically bar relief, under *Younger,* in every Section 1983 action, thereby significantly eroding *Mitchum v. Foster,* 407 U.S. 225 (1972); and (b) render inexplicable this Court's careful focus in each *Younger* decision on the particular subject matter of the state court litigation—as opposed to the mere pendency of the proceeding.

Pennzoil next contends that the state interest at issue here—the interest of the State of Texas "in the functioning and enforcement of its bond and lien laws"—falls within the class of "vital" public interests triggering *Younger* abstention. (JS 15)

---

[42] *Moore v. Sims,* 442 U.S. 415, 423 n.8 (1979).

[43] That is so because, as mentioned above, judicial action taken in such lawsuits inherently involves "the exercise of public power". Under Pennzoil's theory, that "exercise of public power" itself mandates application of *Younger.* (JS 14)

To support that contention, Pennzoil relies on this Court's decision in *Juidice v. Vail,* 430 U.S. 327 (1977). Pennzoil, however, seriously misconstrues the holding of that case.

In *Juidice,* the federal plaintiff had been arrested and incarcerated pursuant to a state court order of contempt rendered against him after he (a) had ignored a court-ordered subpoena requiring him to attend a deposition; and (b) had ignored a further court order requiring him to appear to explain his failure to obey the subpoena.[44] Rather than respond to the contempt order, the federal plaintiff brought a federal challenge to the state debt collection procedure, which included the deposition and contempt citation he had ignored.

This Court ruled that federal abstention was appropriate in those circumstances. Pennzoil suggests that the Court did so because it recognized that the collection of private debts amounts to a "vital" state interest. (JS 15) Pennzoil is wrong.

The Court in *Juidice* could not have made it plainer that the focus of its opinion—the "vital" state interest involved—stemmed from the use of the contempt process itself (and *not* from the particular private interest that contempt happened to serve).[45] The *Juidice* federal plaintiff had been the object of two state court orders and had violated both. Contempt was the state's method of punishing him. As this Court said, the federal plaintiff had committed " 'an offense to the State's interest . . . as great as it would be were this a criminal proceeding' ".[46]

Pennzoil has thus confused the particular private interest that contempt in *Juidice* served with the process of contempt

---

[44] 430 U.S. at 329.

[45] 430 U.S. at 335-36 & n.12. It is, of course, clear why contempt proceedings implicate vital state interests. The contempt power enforces the principle that dissatisfied litigants must challenge state judicial action by lawful process rather than through private disobedience. No principle is more central to the integrity of the state's judicial function.

[46] *Juidice, supra,* 430 U.S. at 336 (quoting *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604 (1975)).

itself.[47] If a federal court may properly enjoin the *entry* of judgment in a state court proceeding, as undoubtedly it may under *Mitchum,* a federal court surely cannot be barred *per se* from enjoining ancillary statutes governing the timing and terms on which state court judgments are to be secured.[48]

Certain additional unusual and distinguishing features of this case underscore the illogic of finding a "vital" *Younger* interest here.

First, unlike any *Younger* case in this or any other court, here the narrow federal relief does not interfere with "the regular operations of [the state's] judicial system". (JS 15, quoting *Juidice,* 430 U.S. at 355.) In every case requiring *Younger* abstention, the federal plaintiff sought to stop an ongoing state proceeding in its tracks. The narrow federal relief at issue here achieves the very opposite result. That relief was sought (and is required) to enable the state litigation to continue to completion *within* the state system. That relief advances the same interest that every *Younger* case has sought to protect.

Second, unlike any *Younger* case in this or any other court, "[h]ere the state [of Texas] has no interest in the underlying [state court] action" (A34), and explicitly so stated in the court below (Tex. Br. at 2). Neither Texas nor any Texas state agency is a party to the *Pennzoil v. Texaco* lawsuit. "It is a suit between two private parties stemming from the defendant's alleged tortious interference with the plaintiff's contract with a third private party. An injunction here does not prevent any arm of the state from acting to vindicate a state policy or to punish an infraction of state rules." (A34)

---

[47] *Juidice* itself placed no weight on the private debt collection function advanced by contempt there. This Court described the debt collection function as involving "purely private concerns", and contrasted the state's vital interest in contempt with those private interests in aid of which contempt may sometimes be invoked. 430 U.S. at 336 n.12.

[48] Pennzoil is, therefore, flatly wrong when it characterizes the decision below as holding that "federal injunctions may be granted entirely without comity constraints" whenever the federal defendant is a private party. (JS 15-16) Had the Second Circuit thought that *Younger* could not apply to a private federal defendant, it would have had no reason to consider whether the particular subject matter at issue embodied "vital" state interests adequate to trigger *Younger.*

Third, unlike any *Younger* case in this or any other court, here the only state that could arguably have a "vital" interest in application of the local security provisions—the State of Texas —was a party below but has not itself appealed.

Fourth, unlike any *Younger* case in this or any other court, here there is no claim that the narrow federal relief at issue has in any way compromised the asserted state interest in securing judgments. Pennzoil itself has conceded that it does not need liens or a bond to be secure. (A45-46)

Fifth, unlike any *Younger* case in this or any other court, here the state plaintiff (and federal defendant) has purported "by stipulation" to *waive* the local security statutes—the statutes it asserts embody "vital" state interests—and replace them with *federal* procedures. (JS 2, 17 n.10) That purported waiver suggests that even Pennzoil itself does not believe that the local provisions evidence a "vital" state interest. Nor can Texas have a "vital" state interest in application of the federal procedures.

2. Texaco lacked a practical remedy in the Texas state courts.

Even if a "vital" state interest were present here—and it is not—Pennzoil could not satisfy the second requirement for *Younger* abstention: that there be an adequate and timely remedy for the federal plaintiff within the state court system. Pennzoil contends that, absent an absolute "procedural bar" under local law, *Younger* abstention is required. (JS 16-20) In the circumstances of this case, that contention is nonsense. Where, as here, the threat of great and irreparable harm creates a *de facto* bar to state court relief, it is of no consequence whether there be a *de jure* bar.[49] Under Pennzoil's theory, Texaco would have been required to pursue its Texas state remedies until it was irreparably damaged merely to demonstrate that those remedies were inadequate and untimely. Such a requirement cannot be—and is not—the law.

---

[49] This, of course, is not to suggest that the substantive constraints on state court mandamus in Texas would not have amounted to a *de jure* bar in this case. (*See supra* at n.9) They readily could have.

Nothing in *Moore v. Sims,* 442 U.S. 415 (1979), upon which Pennzoil relies, is to the contrary. In *Moore,* this Court explicitly reaffirmed that "extraordinary circumstances" render *Younger* inapplicable when necessary to prevent "great, immediate, and irreparable harm" to the federal plaintiff.[50] Nowhere in *Moore* does this Court suggest that a state procedural scheme that is at best uncertain in its ability to grant relief to a party faced with imminent irreparable injury provides "an adequate opportunity to raise . . . constitutional claims".[51]

Contrary to Pennzoil's assertion, the Second Circuit did not engage in "abstract and hostile speculations about the effectiveness and timeliness of the state's remedial system". (JS 19) Rather, the Second Circuit's opinion rests on (a) the uncontroverted fact that "absent injunctive relief, enforcement of Texas' lien and supersedeas bond provisions would rapidly produce a catastrophe of major proportions, causing substantial harm to Texaco itself and to thousands of others throughout the United States including stockholders, customers, and suppliers" (A39); (b) the uncontroverted fact that when Texaco sought federal relief on December 17, the company's viability was measurable in *days;* and (c) the uncontroverted fact that "[i]f resolution of [Texaco's] claims [was] to be effective, prompt judicial action [was] essential; time [was] of the essence" (A35).

It was in the context of these uncontroverted facts that the Second Circuit correctly concluded that, given the exigencies and imminent threat of Texaco's destruction, the uncertainty[52]

---

[50] 442 U.S. at 432-33.

[51] 442 U.S. at 430. This Court's reliance in *Moore* (442 U.S. at 425-26 n.9) on *Hernandez v. Finley,* 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez,* 440 U.S. 951 (1979), demonstrates that a practical (albeit not *de jure*) bar suffices to suspend *Younger.* In *Hernandez,* the state security statutes at issue provided for some process and did not impose an absolute procedural bar to the federal plaintiffs raising their constitutional challenge to the security statutes. 471 F. Supp. at 519. The federal court found only that it was "uncertain", "unlikely" and " 'more theoretical than real' " that the state courts would ever address those constitutional claims. *Id.* at 519-20. Based on that finding, the court held that *Younger* did not apply, because the state procedures did "not afford a plain, speedy, efficient and certain remedy for review of [the plaintiffs'] federal claim". 471 F. Supp. at 520. Here, the security statutes provide for *no* process and the only arguably available means of attacking their application was the extraordinary remedy of mandamus, uncertain at best (*see supra* at n.9), and not even suggested in *Hernandez* to be adequate. (A36-37)

[52] *See supra* at 4-5 & n.9.

of the state court mandamus remedy arguably available to Texaco made that remedy inadequate. (A35-38) Only in the rare case (such as this one) where uncertainty cannot be tolerated does uncertainty equate to inadequacy.[53]

Pennzoil's argument, when reduced to its essence, is that Texaco was required to bear the risk of uncertainty and delay within the Texas state court system—no matter how crushing the resulting burden. That is not now—and should not become—the law.

D. The Second Circuit's Subject Matter Jurisdiction Holding Does Not Merit Plenary Review.

Relying principally on this Court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), Pennzoil argues that, simply because Texaco could have made its due process challenge in the Texas state courts, the federal courts are ousted from subject matter jurisdiction over that claim. (JS 7-8, 20-23) Nothing in *Feldman* (or any other case Pennzoil cites) supports that remarkable contention.

---

[53] Pennzoil cites a single Texas case—*Pace v. McEwen,* 604 S.W.2d 231 (Tex. Civ. App. 1980)—in support of its claim that Texas remedies would have been adequate and timely. (JS 18 n.11) In fact, *Pace* shows just the opposite. In *Pace,* the Civil Court of Appeals was able to exercise its injunctive power because the relator had already perfected his appeal. *Id.* at 232. To have perfected an appeal in mid-December, Texaco would have had to waive its new trial motion—which was timely filed on January 9, 1986, and which, under Texas procedural rules (Tex. R. Civ. P. 324), was an absolute prerequisite to preserving issues for appeal. Moreover, the judgment at issue in *Pace* was for recovery of specific real property. 604 S.W.2d at 232. Texas courts have *no* discretion with respect to the minimum bond for a money judgment but are granted *full* discretion with respect to the minimum bond to supersede a judgment for specific property. Tex. R. Civ. P. 364(c). Pennzoil cites no case—and we are aware of none—in which a Texas court enjoined execution of a money judgment, pending appeal, in the absence of a full supersedeas bond.

Pennzoil further asserts that under Tex. Civ. Prac. and Rem. Code § 65.013, the trial court would have had power to stay enforcement of the Judgment pending appeal. (JS 18-19 n.11) Pennzoil is wrong. The cases construing the statutory predecessor to § 65.013 make clear that where an opportunity for direct review of a money judgment exists, or where a supersedeas bond has not been posted, an injunction enjoining execution of judgment will not issue. *See Glenn v. Hollums,* 73 S.W.2d 1068, 1071 (Tex. Civ. App. 1934); *Svoboda v. Alexander,* 3 S.W.2d 423, 424 (Tex. Com. App. 1928).

Feldman reaffirmed the established proposition that a federal district court lacks power to engage in "appellate review" of a state court judgment. Under *Feldman,* a federal court engages in such "appellate review" when it adjudicates claims that a state court has already decided or that are "inextricably intertwined" with—that is, seek modification or reversal of—the state court's decision.[54]

Feldman's holding has no application here. As the Second Circuit found, and as Pennzoil concedes, Texaco's due process challenge to the lien and bond provisions was never presented to—far less adjudicated by—a Texas state court. (A21-22; JS 2, 7-8, 20) Nor, as the Second Circuit held, is that claim "inextricably intertwined" with the subject matter of any prior state court decision. (A22-23) The only claim the Texas trial court addressed was Pennzoil's state law claim of tortious inducement. The merits of that tort claim—and the trial court's disposition of it—have nothing to do with the reasonableness or validity of application of the lien and bond provisions. Conversely, Texaco's due process challenge to those provisions does "not call into question the validity of the underlying judgment" of the Texas court. (A27) The validity of the Judgment is something which is now being challenged on appeal in Texas —an appeal made possible precisely because of the limited federal relief granted below.[55]

---

[54] 460 U.S. at 476, 482-84 n.16, 486. The claims in *Feldman* illustrate this narrow principle. In *Feldman,* two applicants for admission to the District of Columbia bar, whom the highest court there had determined in a judicial proceeding to be ineligible, asked the federal court to order the District of Columbia appellate court to allow them to take the bar examination or to admit them to practice. 460 U.S. at 468-69, 472-73. One applicant relied on constitutional claims that had been raised and rejected in the local court. The other applicant relied on claims that could have been, but were not, raised in the local court. This Court held that both litigants' claims were barred—the former claims because they had been actually decided by the local court; the latter claims because they were "inextricably intertwined" with the local court's decision since, if accepted, they would have required reversal of that decision. 460 U.S. at 486-87 & n.18.

[55] The short-lived and uncertain prohibition against enforcement contained in Paragraph 7 of the Judgment in no way constituted a state court determination with respect to the reasonableness or validity of the lien and bond provisions as applied. As the Second Circuit noted, Paragraph 7 was simply the product of a "consent" agreement between Pennzoil and Texaco. (A7)

Pennzoil relies on this Court's statement in *Feldman* that "[b]y failing to raise his [constitutional] claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court". (JS 22, quoting from 460 U.S. at 484 n.16) That misses the point. The forfeiture referred to in *Feldman* can occur only when the constitutional claim seeks modification or reversal of the state court decision. The claims in *Feldman* plainly sought such reversal. The claims here plainly do not.[56]

Pennzoil's reliance on *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), is also misguided. Pennzoil argues that, under *Huffman*, state court defendants must raise in state court all federal claims connected in any way with the state proceeding. (JS 21-22) But *Huffman* was a *Younger* case, and its limitation on the defendant's choice of forum applies only where—unlike here—the state proceeding implicates a "vital" *Younger* interest. (*See supra* at 21-25) This Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), makes clear that that limiting feature of *Huffman* cannot be ignored. In *Moses*, this Court reaffirmed the "virtually unflagging obligation" of the federal courts to exercise their concurrent jurisdiction without regard to the pendency of the federal plaintiff's claims in a parallel state action.[57]

In sum, Pennzoil is wrong in contending that, so long as a federal constitutional challenge can be raised in an on-going state proceeding, that avenue is a litigant's "sole recourse". (JS 20) As the Second Circuit correctly held, Pennzoil's argument turns "settled law" on its head. (A22)

---

[56] For the same reason, Pennzoil is wrong in asserting that the decision below is in "conflict" with the Fifth Circuit's rulings in *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986) and *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985). (JS 21 & n.13) In both those cases, the federal court lawsuit asserted claims that sought modification or reversal of a prior state court decision.

[57] 460 U.S. at 15. Far from supporting Pennzoil's reading of *Feldman*, *Huffman* actually undermines it. If Pennzoil were correct about *Feldman*—and it is not—this Court wasted its time deciding the abstention issue in both *Huffman* and *Juidice v. Vail*, since there would have been no subject matter jurisdiction over the Section 1983 claims in those cases to begin with. For the same reason, under Pennzoil's reading of *Feldman*, federal courts would not have jurisdiction to make the res judicata inquiries mandated by this Court's decisions in *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984) and *Haring v. Prosise*, 462 U.S. 306 (1983).

CONCLUSION

Involved here is the validity of state security provisions challenged, not on their face, but only as applied to "the unique and extraordinary circumstances of this case" (A35) which "are unlikely ever again to recur" (A50). The result of the narrow ruling below is to assure that state judicial processes go forward to completion, rather than being arbitrarily terminated by interim and unnecessary enforcement of a judgment that is neither final nor preclusive, that is still subject to corrective review and reversal, and that raises serious questions under both federal and state law. Moreover, the private party that is here championing the local security provisions has conceded that it in fact does not need security for its judgment, has publicly threatened to use the local provisions to apply settlement pressure so as to avoid any appellate review, and has purported to "waive" the local provisions and replace them with federal procedures.

Such a narrow and unusual case does not merit plenary review. For the reasons stated above, this Court should summarily affirm the result below.

Respectfully submitted,

THOMAS D. BARR
DAVID BOIES
MAX R. SHULMAN
FRANCIS P. BARRON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

May 31, 1986

No. 85-1798

(3)

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO MOTION TO AFFIRM

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

June 10, 1986

16 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. TEXACO'S ATTEMPT TO NARROW THE SCOPE OF THE ISSUES BEFORE THIS COURT CANNOT SUCCEED.	3
II. AN AFFIRMANCE OF THE JUDGMENT BELOW WOULD NECESSARILY ERODE THE ANTI-INJUNCTION ACT.	5
III. AN AFFIRMANCE WOULD NECESSARILY UNDERMINE *YOUNGER*.	6
IV. AN AFFIRMANCE WOULD ENTAIL PREMATURELY SECOND-GUESSING A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS.	10
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Ammex Warehouse Co. v. Archer, 381 S.W.2d 478 (Tex. 1964)	8
Bender v. Williamsport School Dist., 106 S.Ct. 1326 (1986)	3
Bergman v. West, 262 S.W.2d 435 (Tex. Civ. App. 1953)	8
Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970)	10
Dandridge v. Williams, 397 U.S. 471 (1970)	10
Davis v. Scherer, 104 S.Ct. 3012 (1984)	3
Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985)	10
Glenn v. Hollums, 73 S.W.2d 1068 (Tex. Civ. App. 1934)	9
Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	2
Hernandez v. Finley, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)	7
Juidice v. Vail, 430 U.S. 327 (1977)	3, 9
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	5, 6
New Motor Vehicle Bd. v. Fox, 439 U.S. 96 (1978)	10
Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. 1980)	7, 8
Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)	9
Stefanelli v. Minard, 342 U.S. 117 (1951)	2
Svoboda v. Alexander, 3 S.W.2d 423 (Tex. Com. App. 1928)	9

PAGE

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) 10

Weinberger v. Salfi, 422 U.S. 749 (1975) 10

Younger v. Harris, 401 U.S. 37 (1971) 5

Statutes

28 U.S.C. § 1254(2) 2, 3

28 U.S.C. § 1257 5

42 U.S.C. § 1983 5

Texas Civ. Prac. & Rem. Code § 65.013 ..... 8, 9

Texas Prop. Code Ann. § 52.001 6

Rules

Texas R. Civ. P. 329b(e) 8

Texas R. Civ. P. 363 8

Texas R. Civ. P. 364(a) 4, 8

Texas R. Civ. P. 364(b) 8

Texas R. Civ. P. 364(c) 8

Other Authorities

C. Wright, *Federal Courts* (4th ed. 1983) 3

The Houston Chronicle (May 23, 1986) 9

INTRODUCTION

The basic refrain of Texaco's Motion to Affirm (MTA)[1] is: Don't worry, it'll never happen again. Appellee's vigor in pressing this point makes one wonder if perhaps Texaco doth protest too much: why argue that the federal intrusion upheld below could never happen again unless one senses that it *should* never happen again? In truth, it should never have been allowed to happen here.

For what Texaco says makes this case unique is in fact something that has yet to occur at all: a flat insistence by Texas on rigidly enforcing the state's lien and bond rules in the face of an objection *in its courts* as to the dire and unconstitutional results of doing so on these facts. But Texaco cannot be permitted to obscure the fact that it has *never* given the courts of Texas a chance even to *consider* its objections to such rigid enforcement. With or without Pennzoil's express waiver of its rights under the regime Texaco contests (*see* A129; JS 17 & n.10), there is simply no reason to assume that the Texas courts would have been any less sensitive than the federal judiciary to Texaco's legitimate concerns or that travelling to a federal court half a continent away represents a more rapid or certain path to a just outcome than would have been available in the Texas judicial system. Indeed, the *more* its situation can be fairly characterized as unique, the *less* justified is Texaco's unsubstantiated assumption—an assumption central to Texaco's case—that the Texas courts would blindly apply the standard, non-constitutional bond precedents cited by Texaco and by the court below, and would simply *ignore* Texaco's federal constitutional objections.[2] This Court's decisions per-

---

1. References to the Motion to Affirm will be styled "MTA____"; to the Jurisdictional Statement, "JS____"; to the Appendices to the JS, "A____."

2. Texaco's forecast of futility for the state court challenge that it has yet to make is based on its extrapolation from cases that raised no claim under the federal Due Process Clause or under the Texas "open courts" guarantee—and cases that presented nothing akin to Texaco's supposedly "unique and extraordinary circumstances" (MTA9). Texaco's entire claim thus rests solely on pessimistic forecasts about how Texas courts would resolve questions that have never been put to them.

mit no such distrust and disdain for state courts as forums fully willing and able to vindicate federal rights.

What cannot be deemed unique to this case is the practice of endorsing federal "flanking movement[s] against the system of State courts," *Stefanelli v. Minard*, 342 U.S. 117, 123 (1951)—a practice that, if warranted on these facts, must be deemed warranted in a wide range of situations. It would be unprincipled and lawless to permit the court below to excuse its departure from precedent by saying, in effect, "only for Texaco." And it would be imprudent to suppose that other "exceptions" will not be made for other litigants. It is instructive to note in this regard how casually both Texaco (MTA7 & n.14, 13 & n.23) and the courts below (A14, 51, 76) extended, to a situation much less compelling (*see* JS 12 n.6), the Fifth Circuit's supposedly "unique" action in the civil rights context of *Henry v. First Nat'l Bank*, 595 F.2d 292 (5th Cir. 1979), where this Court merely denied certiorari. 444 U.S. 1074 (1980).[3] Even if a single point on a legal plane may be safely ignored, *two* points would surely make a line, especially if one of them were highlighted by an affirmance by this Court, in a case that Texaco concedes falls within the obligatory jurisdiction conferred by 28 U.S.C. § 1254(2). The importance and the complexity of the federal questions presented by this appeal are evident even from the Motion to Affirm; summary affirmance is therefore unthinkable.[4]

---

3. Indeed, the district court, relying on *Henry*, treated the issuance of an injunction against Texas proceedings in this case as almost routine: "[T]he imposition of this sort of injunction is hardly unique." (A76).

4. Nor is it too late for this Court, in its 1986-87 Term, to remit to the Texas courts the matter of arranging security pending the appeal of Pennzoil's trial court judgment—an appeal unlikely to be concluded even in the Texas courts alone prior to mid-1987 at the earliest. But should this Court be concerned lest developments in Texas overtake its docket and moot the matter before principles of federalism may be vindicated here, the suitable form of prompt disposition would be summary reversal on the ground that the federal courts were wrong to intrude at all.

I. TEXACO'S ATTEMPT TO NARROW THE SCOPE OF THE ISSUES BEFORE THIS COURT CANNOT SUCCEED.

It is understandable that Texaco should be apprehensive about this Court reviewing the Second Circuit's jurisdictional holdings, but Texaco's suggestion that the Court might properly confine its obligatory review under § 1254(2) to the merits of the Second Circuit's "due process ruling" (MTA14 n.26) is altogether frivolous. For a federal appellate court cannot pass on the merits of a lower court's decision without first finding that that court properly asserted jurisdiction to *reach* the merits. *See, e.g.*, C. Wright, *Federal Courts* 22-23 (4th ed. 1983).[5]

Texaco's attempt substantively to narrow the due process issue presented by this appeal is no more convincing than its procedural gambit. *First*, the holding below cannot be limited to situations where supposedly "inflexible" security requirements would "destroy" the debtor's right to appeal. (MTA10). Even if the inflexibility of Texas' requirements were conceded—which it is not—only the *size* of the bond that it fears would be required of it allegedly renders its appeal futile. It would not matter to *this* claim whether that bond were imposed by an iron legislative rule or by a flexible, *ad hoc* judicial determination. The Second Circuit's holding thus authorizes federal judicial intervention whenever a state's supersedeas procedure might require a bond large enough to threaten a particular judgment debtor with irreversible enforcement.

---

5. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' " *Bender v. Williamsport School Dist.*, 106 S.Ct. 1326, 1331 (1986). *See also Juidice v. Vail*, 430 U.S. 327, 331 (1977) (on direct appeal from three-judge court, this Court should not reach "merits of the constitutional dispute" where *Younger* should have led lower court to abstain). Texaco's only contrary authority is a curious citation to *Davis v. Scherer*, 104 S.Ct. 3012 (1984), in which this Court reviewed an immunity issue "not related" to the validity of the state law in question after declaring that it has power to decide all the federal questions presented in "cases where the Court of Appeals has declared a state statute unconstitutional," *id.* at 3017 n.7.

Second, the holding below cannot be confined to situations where the required bond or alternate security "deposit", Tex.R.Civ.P. 364(a), is "impossible" for *any* judgment debtor to obtain. (MTA10). For a smaller security requirement imposed on a less wealthy judgment debtor could just as clearly exceed that party's financial capacity—a common occurrence, despite Texaco's rhetorical question (*see* MTA10-11 n.19), since many businesses might be unable to post security because of a limited cash flow and the nature of their assets, whether or not they have net illiquid assets in excess of the judgments against them. Any such debtor's appeal would be "destroyed" no less surely than Texaco claims its own to be.

Third, the holding below cannot be confined to situations where requiring a full bond is supposedly unnecessary to protect the judgment creditor's interests. (MTA10). Despite Texaco's repeated assertions, Pennzoil has never "conceded" that Texaco's size makes further security superfluous.[6] Texaco's assets, after all, represent oil and gas that is readily depletable and of declining value in the midst of the current global oil glut.[7] And even the district court, concerned that "other creditors of Texaco will . . . seek[ ] to perfect security interests higher than that . . . available to Pennzoil" (A77), held that, whatever the size of the appropriate judgment, it "must be secured by assets or obligations at least equal in value . . . ." (A77).[8]

---

6. *See, e.g.*, Pennzoil's Reply Brief in the Second Circuit at 5. The references by both Texaco and the court below to such statements are uniformly citations to hearsay newspaper reports of statements attributed to Pennzoil officials or attorneys. *Compare, e.g.*, MTA5 n.11 and A46 with A116-17.

7. *See* A101 (District Court Findings 80-81); Kerr Affidavit at 3-5, attached to Pennzoil's Second Circuit Motion to Modify or Stay the Judgment.

8. Pennzoil has devoted little effort to refuting Texaco's assertions in federal court about what precise on-going arrangements are needed adequately to secure the state court judgment for the simple reason that this complex matter should be resolved in the tribunals of Texas. That is why this appeal has been brought. That the concrete risk to Pennzoil's security interests grew as oil prices fell and as Texaco's approaches to possible new creditors multiplied, *see* Pennzoil's Second Circuit Motion to Modify or Stay

II. AN AFFIRMANCE OF THE JUDGMENT BELOW WOULD NECESSARILY ERODE THE ANTI-INJUNCTION ACT.

Texaco's astounding suggestion that this case is "narrower than *Lugar* [*v. Edmondson Oil Co.*, 457 U.S. 922 (1982)]," because "this is solely an injunction action, not a suit for damages" (MTA20), completely misconceives the federalism concerns embodied in the Anti-Injunction Act for nearly two centuries: it is axiomatic that *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion. And it is hard to take seriously the idea that, because Texaco could have chosen to seek a § 1983 "injunction . . . against the state officials involved in the proceeding" (MTA19), the Second Circuit's state action holding "has *no* impact on the breadth of the § 1983 exception to the Anti-Injunction Act" *id.* (original emphasis). Obviously, Texaco sued Pennzoil instead of state officials in an attempt to avoid *Younger v. Harris*, 401 U.S. 37 (1971), which would have blocked Texaco's federal foray had it sued "any arm of the state." (A34). *Only* the Second Circuit's expansion of the state action concept enabled it to drive a wedge between the Anti-Injunction Act and *Younger*, creating the opening through which Texaco obtained federal relief *pendente lite*.

Texaco's Motion to Affirm distorts *Lugar* by undermining the only principled limitations that can prevent *Lugar* from becoming an all-purpose doctrine transforming *every* state-court judgment winner who seeks enforcement into "the

---

the Judgment at 4, while accounting for a delayed decision to press this appeal, *cf.* MTA6 n.12, is, of course, legally immaterial.

Pennzoil declines to speculate on Texaco's motives for seeking federal intervention in Texas judicial proceedings. *Compare* MTA6 & n.12. But it must be noted that, contrary to Texaco's misrepresentation to this Court that Texaco "did not seek" to have the Texas judgment "review[ed] or modifi[ed]" by a federal court (MTA7), Texaco has in fact used the federal judiciary in just such an effort to undo its Texas trial loss: its federal complaint sought "appellate review on the merits of the Texas judgment in violation of 28 U.S.C. § 1257 as interpreted by [this] Court" (A5), and the district court granted injunctive relief to that end before being rebuked and reversed by the Second Circuit. (A19). Indeed, Texaco persists in arguing to *this* Court that the Texas trial court's judgment was "*erroneous*." (MTA12) (original emphasis).

state." *Lugar* held a state-court plaintiff to be a state actor only because state law abdicated to him the unilateral and unsupervised power to determine, simply by filing a complaint and an *ex parte* attachment petition, *see* 457 U.S. at 924, both that a debt was owed and that security therefor was required pending trial. Pennzoil wields no such power. The determination that Texaco owes Pennzoil damages was made by a judge and jury after a 4½ month trial; the decision presumptively to require security for all such judgments was made by the Texas Legislature when it enacted § 52.001 and by the Texas Supreme Court when it promulgated Rule 364; and the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request. *See* III *infra*. A winning plaintiff like Pennzoil, which the Second Circuit credits with "unilateral" power to make "state officials do [its] bidding" (A28), is in truth relegated to the role of delivery boy:[9] all the *power* at issue is wielded by organs and agents of the State of Texas. The suggestion that Pennzoil is here exercising unsupervised and unilateral official state power can be advanced, therefore, only by completely and artificially severing the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed.

III. AN AFFIRMANCE WOULD NECESSARILY UNDERMINE *YOUNGER*.

Most alarming is the Second Circuit's holding that *Younger* can be evaded by a federal plaintiff's unilateral, self-serving prediction that resort to state judicial procedures would be futile. The gravamen of Texaco's argument is not that it could not have *raised* its constitutional challenge in the Texas courts, but that such a challenge would probably have been denied, since none had ever succeeded in the past. (MTA27 n.53). Even

---

9. Pennzoil's role in enforcing its judgment against Texaco would be limited to asking the Texas court for a writ of execution and delivering it to a sheriff. (A25; MTA1 n.2). And its role in perfecting judgment liens against Texaco would likewise be limited to obtaining an abstract of the trial court's judgment from one court clerk and handing it to another for recording and filing. (A25-26; MTA2 n.3).

if that were the *Younger* standard—which it is not[10]—Texaco persists in ignoring the fact that the Texas courts have *never been given the opportunity* to address a challenge like Texaco's to the lien and bond provisions.[11]

More fundamentally, Texaco's claim that Texas remedies are inadequate—a claim without which Texaco's entire case crumbles—is built upon three gross misrepresentations of Texas law. If Texaco and the Second Circuit had taken Texas law seriously, they would have found several rapid ways for Texaco to stay the judgment *while* challenging the lien and bond provisions.[12]

First, like the judgment debtor in *Pace v. McEwen*, 604 S.W.2d 231, 233 (Tex.Civ.App. 1980), Texaco could have

---

10. Texaco errs in relying on *Hernandez v. Finley*, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979), for the proposition that something less than a "procedural bar" to raising one's federal claims will suffice to suspend the abstention requirement. (MTA26 n.51). The court in *Hernandez* in fact found just such an absolute procedural bar when it accepted the argument that the pre-judgment attachment statute at issue "restrict[ed] challenges to the attachment exclusively to the issues of whether prescribed procedures have been followed and whether the allegations of the affidavit are true." 471 F.Supp. at 519.

11. Texaco fails to mention that the Texas "conference" it requested on December 13, 1986 (MTA4)—three days *after* it sought injunctive relief and appellate review of the Texas judgment in the federal district court in White Plains—would have concerned only alleged "uncertainties" in the Paragraph 7 "stand-still" arrangement, and not the state *or* federal constitutionality of applying the lien and bond provisions. (A10). Texaco also elides the fact that it submitted its "request" *in forma pauperis* by *letter*, not by motion or petition, and the fact that Texaco failed to respond to requests by both Pennzoil and the Texas trial court that Texaco comply with the Texas Rules of Civil Procedure if it wished a hearing. (*See* District Court Findings Nos. 82, 85-87, A101-02).

12. Texaco nowhere denies that, even without posting a supersedeas bond, it still had *3½ months* in which to ask the Texas courts for relief. Texaco filed its federal injunction action on December 10, 1985—before the Texas judgment had even been *entered*—even though the stand-still agreement to which Texaco had that very day consented ensured that Texaco need fear no enforcement of the judgment or attachment of liens until late March of 1986. (A7 & n.3; A127-28).

sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond.*[13]

Second, the Texas trial court itself is "vested" with the power "to grant a temporary injunction to prevent damage to an appellant," when enforcement of a civil judgment would render the right to appeal "meaningless." *Pace, supra*, 604 S.W.2d at 233, 232. (*See* JS 18 n.11).[14]

Third, as Pennzoil previously explained (JS 18 n.11), a Texas trial court has *explicit statutory power* to "stay a judgment" (not merely to stay its execution) if the complainant can show himself "equitably entitled to be relieved against" part or all of that judgment. Tex.Civ.Prac. & Rem.Code § 65.013. Contrary to Texaco's contention that such relief will not lie if the judgment debtor has not filed a supersedeas bond in compliance with Rule 364 (MTA27 n.53), that rule, *as amended in 1984*, explicitly recognizes that in appropriate circumstances other statutes may govern the suspension of a judgment.[15] Texaco's authorities for the proposition that § 65.013 cannot be applied to mitigate the full bond requirement of Rule 364 pre-date the 1984 amendment by half a century and are in any event utterly irrelevant: neither case involved a constitutional challenge such as Texaco's; in neither

---

13. Texaco is simply wrong in stating that it would have had to waive its new trial motion in order to perfect an appeal and petition the appellate court for such relief in mid-December of 1985. (MTA27 n.53). It is black letter law in Texas that Texaco could have perfected its appeal by filing a very small cost bond (*not* a supersedeas bond) on the very day the trial court entered judgment, *see* Tex.R.Civ.P. 363; and "if a motion for new trial is timely filed by any party, the trial court, *regardless of whether an appeal has been perfected*, has plenary power to grant a new trial . . . ." Tex.R.Civ.P. 329b(e) (emphasis added). *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex.Civ.App. 1953).

14. Contrary to Texaco's inexcusable misrepresentation, the *Pace* court enjoined a "forced sale" of real property that had been ordered to satisfy "a money judgment," 604 S.W.2d at 232—*not* a "judgment . . . for recovery of specific real property." (MTA27 n.53). The case thus sounded in Rule 364(b), not (c), and is directly on point.

15. The 1984 amendment to paragraph (a) of Rule 364 added the prefatory phrase "Unless otherwise provided by law . . . ." to the language requiring a full supersedeas bond for the suspension of a judgment. (*See* JS 19 n.11).

case did the judgment debtor attack the required bond as unaffordable or unnecessary; and neither case was in fact governed by the "statutory predecessor to § 65.013" (MTA27 n.53).[16]

Thus timely relief in the Texas courts was fully available. And Texas' interest in being afforded an opportunity (subject to Supreme Court review) to grant such relief in the course of administering its appellate system is no less basic than its interest in assuring that its judicial "orders and judgments are not rendered nugatory." *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). These systemic state interests in overseeing and fine-tuning the appellate process in light of applicable federal constitutional norms remain the same whomever the state court judgment loser sues in federal court.[17] Only the Second Circuit's disregard of these interests permitted it to address the merits of Texaco's constitutional arguments.[18]

---

16. The judgment debtors in *Glenn v. Hollums*, 73 S.W.2d 1068 (Tex.Civ.App. 1934), sought to enjoin a judgment on the basis of an entirely distinct Depression-era foreclosure moratorium statute, *id.* at 1069-70, and in *Svoboda v. Alexander*, 3 S.W.2d 423 (Tex.Com.App. 1928), which did not even involve a supersedeas bond, a temporary injunction against enforcement of a judgment was in fact *granted* by the trial court. *Id.* at 424. Even if Texaco's authorities were arguably relevant, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941), would preclude a federal resolution of the resulting state-law issue. But in fact Texaco has yet to produce even *arguable* support for its mechanical reading of Texas law.

17. Having deliberately declined to sue any Texas officials in an attempt to avoid *Younger*, Texaco cannot now attribute significance to the fact that no Texas officer is a party. (MTA8 n.16). But if Texaco's profligate use of newspaper "authorities" is acceptable, it seems that the Texas Attorney General declined to press a separate appeal because of his confidence that the State's interests would be well represented by Pennzoil and because of his conclusion that "there [was] no need to file duplicate documents." *The Houston Chronicle*, § 1, p.22 (May 23, 1986).

18. While Texaco persists in arguing that the federal interference wrought by its foray to White Plains somehow made the appellate process in Texas more meaningful (MTA24), it has not denied—nor could it—that Congress has never conferred upon lower federal courts the power to displace state tribunals or this Court in protecting the state appellate process and this Court's jurisdiction.

Texaco (MTA28) and the court below (A22-23) err in treating the *Rooker/Feldman* doctrine as applicable only where a litigant seeks to reverse a prior state court decision—treatment that would reduce the doctrine to one of

IV. AN AFFIRMANCE WOULD ENTAIL PREMATURELY SECOND-GUESSING A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS.

Reaching a due process claim it should have left to the state courts, the Second Circuit held it irrational (A44) for Texas to require full security without determining whether doing so is justified on these facts. Even assuming the Texas courts *would* decline to make that determination, it is hardly irrational for a state to deem a trial's completion a watershed, and to use that event as the basis for shifting to the loser any risk of economic loss if the trial result is later overturned.[19] "Once having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions" of the scheme adversely affect a given party. *New Motor Vehicle Bd. v. Fox*, 439 U.S. 96, 108 (1978).[20] Yet Texas might well have done just that—if Texaco had only asked.

CONCLUSION

Far from posing a "narrow and unusual case [that] does not merit plenary review" (MTA30), the decision below constitutes a frontal and wide-ranging assault on judicial federalism and principled adjudication—one that could not be upheld by this Court without serious systemic consequences. Probable jurisdiction should therefore be noted.

---

mere issue preclusion. At least two other circuits have clearly rejected this treatment. *See, e.g., Brown v. Chastain*, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Ganey v. Barefoot*, 749 F.2d 1124, 1127-28 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985). Texaco's contrary assertion (MTA29 n.56) reveals a plain misreading of *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985).

19. Applying such a flat rule would not remotely resemble a decision to render an appeal ineffectual by denying counsel or a trial transcript to indigent criminal defendants; or to allow ineffective assistance of counsel to squander a criminal defendant's appeal; or to allow a clerical snafu to obliterate forever a civil plaintiff's administrative cause of action. (*See* MTA 10 & n.18).

20. *See also Weinberger v. Salfi*, 422 U.S. 749, 772-74, 776-77, 782-83 (1975); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970).

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

June 10, 1986

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1798 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

—v.—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

LAURENCE H. TRIBE
(Counsel of Record)
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

THOMAS D. BARR
DAVID BOIES
(Counsel of Record)
MAX R. SCHULMAN
FRANCIS P. BARRON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

(*Attorneys names continued on Inside Front Cover*)

Appeal Docketed May 1, 1986
Probable Jurisdiction Noted June 23, 1986

36 pp

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

SIMON H. RIFKIND
ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

PAUL M. BATOR
DOUGLAS A. POE
KENNETH S. GELLER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

Counsel for Appellant
Pennzoil Company

PAUL J. CURRAN
(Counsel of Record)
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel:

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Counsel for Appellee
Texaco, Inc.

TABLE OF CONTENTS

PAGE

Docket entries for United States District Court for the Southern District of New York 1

Docket entries for United States Court of Appeals for the Second Circuit 22

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

PAGE

Opinion of United States Court of Appeals for the Second Circuit, dated February 20, 1986 ..... A1

Order of United States District Court for the Southern District of New York, dated January 16, 1986..... A52

Amended Order after remand of United States District Court for the Southern District of New York, dated April 8, 1986 ..... A54

Opinion of United States District Court for the Southern District of New York, dated January 10, 1986..... A56

Supplemental Findings of Fact of United States District Court for the Southern District of New York, dated January 10, 1986..... A79

Judgment of United States Court of Appeals for the Second Circuit, dated February 20, 1986 ..... A118

Order of United States Court of Appeals for the Second Circuit Denying Motion for Recall of Mandate/Clarification, Modification or Partial Stay of Judgment, dated March 27, 1986..... A120

Notice of Appeal to this Court, filed March 21, 1986 .. A121

Judgment of District Court of Harris County, Texas, 151st Judicial District, dated December 10, 1985 .... A123

Pennzoil Stipulation, dated December 20, 1985..... A129

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

DOCKET NO. 85 CIV. 9640 (CLB)

TEXACO, INC.,

Plaintiff,

—v—

PENNZOIL COMPANY,

Defendant,

STATE OF TEXAS,

Intervenor.

Plaintiff's Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

J. PATRICK WISEMAN
Assistant Attorney General
Chief, State & County Affairs
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(515) 463-2120

Defendant's Counsel

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

KAY, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12-10-85	1	Fld. COMPLAINT, issued summons & notice pursuant to 28 U.S.C. 636(c).
12-10-85	2	Fld. STATEMENT pursuant to General Rule 9 of the Rules of this Court, attached hereto is a list of corporate subsidiaries and affiliates of plaintiff Texaco, Inc.
12-13-85	3	Fld. Plaintiff's AMENDED COMPLAINT.
12-18-85	4	Fld. ORDER TO SHOW CAUSE and TEMPORARY RESTRAINING ORDER. Ordered that deft., Pennzoil show cause in Room 31 of the U.S. Courthouse, 101 E. Post Road, White Plains, NY on the 20th day of December, 1985, why, pursuant to Fed. Rule Civ. P. 65, a preliminary injunction should not issue herein enjoining Pennzoil from taking any action to enforce or attempt to enforce the Judgment entered in an action in the District Court of the 151st Judicial District of Texas.
12-18-85	5	Fld. Plaintiff's MEMORANDUM in support of application for Temporary Restraining Order and motion for preliminary injunction.

DATE	NR.	PROCEEDINGS
12-18-85	6	Fld. STATUTORY NOTICE pursuant to 28 U.S.C. § 2403(b). Copy sent to pltf. atty. and Hon. James Mattox, Atty. Gen. of the State of Texas.
12-19-85	7	Fld. LETTER, dated Dec. 18, 1985 from Jerry Lewis, Member of Congress of the 35th district, California asking this Honorable Court to consider in the nature of an *amicus curiae* requesting that Texaco be granted the preliminary injunction.
12-19-85	8	Fld. LETTER dated December 16, 1985 from members of Louisiana Congressional delegation in support of the filing of Texaco, Inc. Signed by Senators and members of Congress: Hon. Russell B. Long, Hon. John Breaus, Hon. W. Henson Moore, Hon. Robert Livingston, Hon. Buddy Roemer, Hon. J. Bennett Johnston, Hon. Lindy Boggs, Hon. Jerry Huckaby, Hon. W.J. (Billy) Tauzin and Hon. Cathy Long.
12-19-85	9	Fld. LETTER dated December 18, 1985 from Howard Heflin and Jeremiah Denton, United States Senate Re: *amicus curiae*.
12-19-85	10	Fld. LETTER dated December 18, 1985 from William M. Thomas, Member of Congress, 20th District, California RE: *amicus curiae*.
12-19-85	11	Fld. LETTER dated December 18, 1985 from Hamilton Fish, Jr. 21st District, NY member of Congress. RE: *amicus curiae*.
12-19-85	12	Fld. LETTER dated December 19, 1985 from Nancy Kassebaum, U.S. Senate, Bob Dole, U.S. Senate, Bob Whitaker, U.S. House of Representatives, Kansas 5th District. RE: *amicus curiae*.
12-20-85	13	Fld. MEMORANDUM in opposition to Texaco's Motion for a preliminary injunction and in sup-

DATE NR. PROCEEDINGS

port of Pennzoil's Cross-Motion to dissolve the TRO and Dismiss the amended complaint.

12-20-85 14 Fld. PENNZOIL STIPULATION. Plaintiff in this action, hereby presents the Court the following stipulation concerning the judgment the Court entered in this action on December 10, 1985. "Pennzoil stipulates and agrees that, if Texaco seeks to supersede or stay the enforcement of this judgment and it makes provisions to secure the judgment which the Texas courts determine would meet the standards of Fed. R. Civ. P. 62, Pennzoil will be bound by any stay that the Texas courts enter based on a finding that Texaco has provided security which meets the standards of Fed. R. Civ. P. 62." Wherefore, Pennzoil requests that the Court accept this stipulation.

12-20-85 15 AFFIDAVIT OF SERVICE: Served upon CT Corp. System, registered agent for service of process in the State of N.Y., at 1633 Broadway, 30th flr., N.Y.C [by] leaving a copy with Mary Grace Murray, Assistant Vice Pres. who accepted on behalf of Pennzoil Co. by Robert B. Zwillich, One Chase Manhattan Plaza, N.Y.C., Dec. 19, 1985. (Affidavit of an answer to the Amended Complaint.)

12-20-85 16 Fld. AFFIDAVIT OF PERSONAL SERVICE: by Robert B. Zwillich, etc. upon CT Corp. Mary Grace Murray, Assistant Vice Pres. 1633 Broadway, N.Y.C. Served Order to Show Cause and Temporary Restraining Order and Mem. in Support of Application for temporary Restraining Order and Motion for Preliminary Injunction. Dec. 19, 1985.

12-20-85 17 Fld. LETTER from Carlos J. Moorehead, Member of Congress RE: he feels that Texaco should be afforded a fair right to appeal.

DATE	NR.	PROCEEDINGS
12-20-85	18	Fld. LETTER from William E. Dannemeyer, Member of Congress dated 12-20-85 RE: *Amicus Curiae.*
12-20-85	19	Fld. LETTER, dated Dec. 20, 1985 from Joseph J. Dioguardi, member of congress RE: *Amicus Curiae.*
12-20-85	20	Fld. LETTER dated Dec. 18, 1985 from David L. Boren, United States, Senator, Don Nickles, U.S. Senator, James R. Jones, Member of Congress and Mike Synar, member of Congress, Dave McCurdy, mem. of cong., Glenn English, mem. of cong., Wes Watkins, mem. of congress and Mickey Edwards, mem. of congress RE: *Amicus curiae.*
12-20-85	21	Fld. LETTER dated Dec. 19, 1985, from Michael N. Castle, Governor, State of Delaware. RE: *amicus curiae.*
12-20-85	22	Fld. ORDER. Motions filed this date by (1) State of Oklahoma by Hon. George Nigh, Governor of the State and Hon. Kurt G. Glassco, Counsel to the Governor; and (2) by State of Wyoming, by Hon. A.G. McClintock, Attorney General, each for leave to appear and file briefs as *amicus curiae* in the above entitled action in support of plaintiff is hereby granted. So Ordered: Brieant, J. m/n
12-20-85	23	Fld. BRIEF OF AMICUS CURIAE the State of Wyoming in support of Texaco's motion for a Preliminary Injunction.
12-20-85	24	Fld. MOTION for permission to file brief as Amicus Curiae (State of Wyoming)
12-20-85	25	Fld. MOTION for permission to file brief as Amicus Curiae (State of Oklahoma)

DATE	NR.	PROCEEDINGS
12-20-85	26	Fld. MOTION for permission to file brief as Amicus Curiae (State of Wyoming)
12-20-85	27	Fld. BRIEF OF AMICUS CURIAE The State of Wyoming in support of Texaco's motion for a Preliminary Injunction.
12-23-85	28	Fld. AFFIDAVIT OF JOHN F. MC GILLICUDDY, Chairman of the Board and Chief Executive Officer of Manufacturers Hanover Corp. his opinion that a Texaco Bankruptcy could have a significant adverse effect on the financial markets.
12-23-85	29	Fld. AFFIDAVIT OF JULIUS L. KATZ, International business consultant formerly chairman of Donaldson, Lufkin, Jenrette Futures, Inc. an international futures brokerage firm, from 1980-1985. This affidavit is submitted in order to detail the adverse effects of the judgment and bonding requirements on the economic interests and the foreign commerce of the United States.
12-23-85	30	Fld. SUPPLEMENTAL AFFIDAVIT OF RICHARD BRINKMAN, Vice Pres. of Texaco, Inc. in further support of Texaco Inc.'s application to prevent Pennzoil Company from enforcing or attempting to enforce the lien and bond provisions of Texas State law in connection with the $11.1 billion judgment against Texaco Inc. entered by the District Court for Harris County, Texas, in an action entitled Pennzoil Company v. Texaco Inc.
12-23-85	31	Fld. AFFIDAVIT OF DAVID D. BURROWS, Vice Pres. of Morgan Guaranty Trust Co., of NY. Attached hereto is the opinion of Morgan Guaranty Trust Company of NY with respect to these issues.

DATE	NR.	PROCEEDINGS
12-23-85	32	Fld. AFFIDAVIT OF KENNETH W. DAM, Vice Pres. of International Business Machines Corp. is aware that judgment, together with certain procedural provisions of Texas law regarding liens and bonding requirements, have raised serious questions concerning Texaco's ability to continue to finance and operate its business during the course of its appeals.
12-23-85	33	Fld. AFFIDAVIT OF PAUL J. CURRAN, a member of the firm Kaye, Scholer, Fierman, Hays & Handler, co-counsel to plaintiff Texaco Inc. in support of Texaco's motion for a preliminary injunction.
12-23-85	34	Fld. MOTION for permission to file brief as Amicus Curiae. The State of Wyoming respectfully moves this Court for leave to file a brief as amicus curiae.
12-23-85	35	Fld. BRIEF OF AMICUS CURIAE the State of Wyoming in support of Texaco's Motion for a preliminary injunction.
12-23-85	36	Fld. MOTION for permission to file Brief as Amicus Curiae. The State of Oklahoma respectfully moves this Court for leave to file a brief as amicus curiae in the above action.
12-23-85	37	Fld. BRIEF OF AMICUS CURIAE The State of Oklahoma in support of Texaco's Motion for a preliminary injunction.
12-27-85	38	Fld. LETTER, from Tom Carper, Member of Congress, Delaware's Rep. re: Amicus Curiae. Letter dated 12-23-85.
12-27-85	39	Fld. LETTER from William V. Roth, Jr. U.S. Senate for the State of Delaware. RE: Amicus Curiae. Letter dated 12-20-85.

DATE	NR.	PROCEEDINGS
12-27-85	40	Fld. LETTER from Glenn M. Anderson, Member of Congress, 32D Dist. of California re: amicus curiae. Letter dated 12-18-85.
12-27-85	41	Fld. LETTER from Bob Dole, U.S. Senate, Nancy Kassebaum, U.S. Senate and Bob Whittaker, U.S. House of Representatives, Kansas 5th Dist. re: Amicus Curiae letter dated Dec. 18, 1985.
12-27-85	42	Fld. transcript of record of proceedings, dated 12-20-85.
12-27-85	43	Fld. ORDER EXTENDING TEMPORARY RESTRAINING ORDER. Ordered that Pennzoil are jointly and severally enjoined and restrained, pending a hearing on and determination of the motion for a preliminary injunction or to vacate this Temporary Restraining Order, from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in *Pennzoil v. Texaco*. It is further Ordered that this Court shall schedule a hearing at the earliest possible time convenient to the Court upon either Texaco's request for a hearing on its Motion to dismiss the complaint in the above action or to vacate this TRO, and it is further Ordered that personal delivery of a copy of this Order to Pennzoil or its duly authorized agent, forthwith, and in any case not later than 5:00 p.m. Central Standard Time, Dec. 31, 1985, shall constitute due and sufficient service thereof. So Ordered: Brieant, J. m/n
12-27-85	44	Fld. LETTER, dated Dec. 26, 1985 from William Leighton, 249 W. 11th St., NY, NY re: Amicus curiae.

DATE	NR.	PROCEEDINGS
01-02-86	45	Fld. LETTER dated Dec. 18, 1985 from Jack Brooks, 9th Dist. Texas Representative. He writing to indicate the devastating impact the litigation may have on the welfare and livelihood of his constituents.
01-02-86	46	Fld. PROPOSED ORDER AND ENDORSEMENT ORDER. I decline to sign the within proposed order. While Mr. Leighton has been permitted to file papers in the nature of amicus curiae, along with others, he does not possess the necessary standing to obtain the relief sought here. Motion denied. So Ordered: Brieant, J. m/n Letter dated December 31, 1985.
01-02-86	47	Fld. MOTION TO APPEAR PRO HAC VICE. Michael D. Franks, Chief Trial Counsel, Florida Dept. of Legal Affairs, on behalf of Florida Atty. Gen. Jim Smith and the State of Florida, moves, pursuant to local Rule 2(c) of the Gen. Rules of the Southern Dist. of NY, to appear pro hac vice on behalf of amicus curiae State of Florida.
01-02-86	48	Fld. MOTION OF STATE OF FLORIDA for permission to file brief as amicus curiae.
01-02-86	49	Fld. BRIEF OF AMICUS CURIAE the State of Florida in support of Texaco's motion for a preliminary injunction.
01-03-86	50	Fld. ORDER. Motions filed this date by (1) State of Florida by Hon. Jim Smith, Atty. Gen., and Mitchell D. Franks, Chief Trial Counsel; and (2) by State of Kansas, by Hon. Robert T. Stephen, Atty. Gen., each for leave to appear and file briefs as amicus curiae in the above entitled action in support of plaintiff is hereby granted. So Ordered: Brieant, J. m/n

DATE NR. PROCEEDINGS

01-03-86 51 Fld. NOTICE OF MOTION. On 12-30-85 at the U.S. Courthouse, 101 E. Post Rd., White Plains, NY The State of Kansas respectfully moves this Court for leave to file a brief as amicus curiae.

01-03-86 52 Fld. BRIEF OF AMICUS CURIAE the State of Kansas in support of Texaco's Motion for a Preliminary Injunction.

01-08-86 53 Fld. Plaintiffs proposed findings of fact and Conclusions of Law.

01-08-86 54 Fld. Reply Memorandum in support of Plaintiffs' Motion for a preliminary Injunction and in Opposition to Defts Motion to dissolve the TRO and dismiss the Amended Complaint.

01-08-86 55 Fld. Plaintiffs, Supplemental Affidavit of David Boies. Atty.

01-08-86 56 Fld. Plaintiffs, Affidavit of Francis P. Barron. Atty.

01-08-86 57 Fld. Plaintiffs, Affidavit of Simon P. Orme, Managing Director of Morgan Stanley & Co. Inc. ("Morgan Stanley").

01-08-86 58 Fld. Plaintiffs, Supplemental Affidavit of Richard G. Brinkman, Vice President of Texaco Inc. (Plaintiff).

01-08-86 59 Fld. Plaintiff, Affidavit of James B. Sales, Atty. in the action case (Cause No. 84-05905 in the District Court of Harris County, Texas).

01-08-86 60 Fld. Plaintiffs, Affidavit of Lester C. Thurow, I am Gordon Y. Billard Prof. of Management & Economics at the Sloan School of Management of the Mass. Institute of Technology. . . .

01-08-86 61 Fld. LETTER dated Jan. 8, 1986 from Plaintiffs attorneys to advise the Court of the parties'

DATE NR. PROCEEDINGS

efforts to define the scope of tomorrow's hearing.

01-09-86 62 Fld. SUPPLEMENTAL AFFIDAVIT of Richard G. Brickman, Vice Pres. of Texaco Inc. in support of the motion for a preliminary injunction by Texaco to prevent Pennzoil Company from enforcing or attempting to enforce the lien and bond provisions of Texas State law in connection with the $11.1 billion judgment against Texaco entered by the District Court of Harris County, Texas, in an action entitled Pennzoil Company v. Texaco Inc. Supplemental affidavit to explain certain financial consequences to Texaco that will occur if Texaco's motion for a preliminary injunction is not granted.

01-09-86 63 Fld. LETTER dated December 28, 1985 from Emile M. Lapeyre, Jr. President of Sunset Corporation, Houma, Louisiana to inform the court of some of Texaco's outrageous deportment in Louisiana.

01-09-86 64 Fld. SUPPLEMENTAL AFFIDAVIT OF G. IRVIN TERRELL a member of Baker & Botts, of counsel to defendant Pennzoil. Submit this Supplemental Affidavit to correct certain misstatements by Texaco concerning the availability to Texaco of a procedure in the Texas state courts to consider Texaco's constitutional arguments, and concerning Texaco's failure to invoke any of those procedures.

01-09-86 65 Fld. SECOND AFFIDAVIT OF G. IRVIN TERRELL in opposition to Plaintiff's motion for a preliminary injunction and in support of Defendant's Cross-Motion to dissolve TRO and dismiss Amended Complaint.

DATE	NR.	PROCEEDINGS
01-10-86	66	Fld. MOTION TO APPEAR PRO HAC VICE. J. Patrick Wiseman, Attorney with the Atty. Gen. Office of the State of Texas.
01-10-86	67	Fld. MOTION TO APPEAR PRO HAC VICE. Kevin T. O'Hanlon, Attorney representing Intervenors. Mr. O'Hanlon is an attorney with the Attorney General's Office of the State of Texas and has been assigned to represent the Intervenors in this case.
01-10-86	68	Fld. MOTION OF THE STATE OF TEXAS TO INTERVENE. Pursuant to Art. 28 U.S.C. § 2403(b) moves this court for permission to intervene in this cause for presentation of evidence and argument on the constitutionality of state law.
01-10-86	69	Fld. MOTION FOR CONTINUANCE. Comes now the State of Texas moves this Court for an order of continuance in this cause.
01-10-86	70	Fld. MEMORANDUM TO DOCKET CLERK. Hearing held January 9, 1986. Motion to intervene by Attorney General of the State of Texas is granted. Motions by assistant Attorney Generals to appear Pro Hac Vice is granted.
01-10-86	71	Fld. ORDER. Letter, dated Jan. 9, 1986 from David Berger, Atty. Treating this letter as a motion to shorten the notice of motion to intervene presently returnable January 29, 1986. The motion to accelerate the time is denied. So Ordered: Brieant, J. m/n
01-10-86	72	Fld. SUPPLEMENTAL FINDINGS OF FACT, found to the extent not unconsistent with this Court's opinion in writing of even date. So Ordered: Brieant, J. m/n

DATE	NR.	PROCEEDINGS
01-10-86	73	Fld. OPINION #86,0001 WP. The Court makes the following findings of fact and conclusions of law after a hearing, and pursuant to Rule 65, F.R.Civ.P.*1/* . . . . . Accordingly, this Court finds there is no legal bar, and no genuine issue of disputed relevant fact that prevents granting this injunction. There is absolutely no reason in the world why it should not be granted. Texaco has to post One (1) Billion dollar bond. The Court will grant Texaco twenty (20) day period following entry of the order hereon, during which to propose and submit additional security for a preliminary injunction, beyond the sum of $1,000.000 posted to secure the Temporary Restraining Order, which shall be satisfactory to the Court, after having heard counsel for Pennzoil on that subject. The cross motion of defendant Pennzoil is denied. So Ordered: Brieant, J. m/n
01-13-86	74	Fld. LETTER, dated January 9, 1986 from Paul N. Silverstein of Booth, Marcus & Pierce Counsel to the Committee of Concerned Employees and Retirees of Texaco, Inc. The Committee supports Texaco's Motion for a preliminary injunction against the Pennzoil Company.
01-13-86	75	Fld. NEW TRIAL MOTION. Pursuant to leave granted by the Court, Pennzoil hereby submits Texaco's "Motion for New Trial or Alternatively to Vacate or Reform the Judgment" in Texas for inclusion in the record of the proceedings before this Court.
01-10-86	76	Fld. MOTION of John F. Browne, et al., acting individually and as the Texaco Shareholders Protective Committee, to intervene pursuant to F.R.C.P. 24(b)

DATE	NR.	PROCEEDINGS
01-10-86	77	Fld. NOTICE OF MOTION TO INTERVENE Counsel for Texaco Shareholders Protective Committee will move this court, 101 E. Post Rd., White Plains, NY on the 29th day of January 1986.
01-10-86	78	Fld. MEMORANDUM in support of the motion of John F. Brown, et al., acting individually and as the Texaco Shareholders Protective Committee, to Intervene pursuant to Fed. R. Civ. P. 24(b).
01-10-86	79	Fld. defendant, Pennzoil Company NOTICE OF APPEAL from the Order, entered on January 10, 1986, granting a preliminary injunction against defendant Pennzoil Company. Mailed copies to Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, New York 10005 and Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10154 and Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York and Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002.
01-13-86	—	Forwarded copy of Notice of Appeal to District Judge Brieant and copy of Notice of Appeal and docket entries to Court of Appeals, Second Circuit, 17th Floor, Room 1702, U.S. Courthouse, 40 Centre St., New York, NY 10007 this date.
01-16-86	80	Fld. LETTER, dated January 14, 1986 from Max R. Shulman from the law firm of Cravath, Swaine & Moore re: Proposed counter order to the proposed order submitted by Pennzoil on Saturday, Jan. 11, 1986 stating that Pennzoil's proposed order is deficient.
01-16-86	81	Fld. LETTER, dated January 11, 1986 from Mark A. Belnick from the law firm of Paul, Weiss, Rifkind, Wharton & Garrison re: Proposed for-

DATE NR. PROCEEDINGS

mal order providing for the preliminary injunction granted by this Court on January 10, 1986.

01-16-86 82 Fld. ORDER. Ordered that the motion of plaintiff, Texaco Inc., for a preliminary injunction is hereby granted; and it is further Ordered that defendant, Pennzoil Company, its employees, agents, attorneys and servants, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are jointly and severally enjoined and restrained, pending trial and ultimate disposition of this action, or the further order of this court, from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company* v. *Texaco Inc.*, including, without limitation, attempting to obtain or file any judgment lien or abstract of judgment related to said Judgment, or initiating or commencing steps to execute on said Judgment; and it is further Ordered that within twenty (20) days following entry of this Order, plaintiff shall propose and submit to the Court security in the total amount of $1,000,000,000 (One Billion Dollars), including the sum of $1,000,000 (One Million Dollars) heretofore posted to secure the TRO, which security shall be in a form satisfactory to the Court after having heard counsel for defendant Pennzoil Company on that subject; and it is further Ordered that a hearing concerning the appropriateness of any such security tendered by plaintiff Texaco Inc. may be heard on 24 hours' notice by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available and it is

DATE	NR.	PROCEEDINGS
		Further Ordered that the motion of deft. Pennzoil Company to dissolve the TRO issued by this Court on Dec. 17, 1985, and extended by consent of the parties by order dated Dec. 23, 1985, and to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted and for want of subject matter jurisdiction, is hereby granted; and it is further Ordered that the status conference required pursuant to Rule 16, F.R.Civ.P. shall be held by this Court on April 7, 1986 in Courtroom 31 at the United States Courthouse, 101 East Post Road, White Plains, NY 10601. So Ordered: Brieant, J. m/n
01-16-86	83	Fld. PLAINTIFF'S PROPOSED ORDER AND NOTICE OF SETTLEMENT. "Not signed" Brieant, J. m/n
01-16-86	84	Fld. "DEFENDANT'S PROPOSED ORDER AND NOTICE OF SETTLEMENT, not signed" Brieant, J. m/n
01-16-86	85	Fld. the State of Texas, Intervenor, NOTICE OF APPEAL from the Preliminary Injunction Order entered on January 10, 1986. Mailed copies to J. Patrick Wiseman, Assistant Attorney General, Chief, State & County Affairs, P.O. Box 12548, Capitol Station, Austin, Texas 78711 Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002 Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, NY 10154 Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, NY 10005 Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, NY 10022
01-16-86	—	Forwarded copy of Notice of Appeal to District Judge Brieant and copy of Notice of Appeal and docket entries to Court of Appeals this date.

DATE	NR.	PROCEEDINGS
01-16-86	86	Fld. U.S.C.A., for the Second Circuit NOTICE OF MOTION for Expedited Appeal. A True Copy, Elaine B. Goldsmith, Clerk It is hereby ORDERED that the motion is hereby granted to the extent that the record on appeal, the joint appendix and appellant's brief shall be filed on or before January 23, 1986; appellee's brief shall be filed on or before February 3, 1986; oral arguments shall be heard on an expedited basis as early as the week of February 10, 1986.
01-16-86	87	Fld. STIPULATION & ORDER. Defendant Pennzoil Company's time to answer the amended complaint is extended to 30 days after the date on which the U.S.C.A. for the Second Circuit issues its mandate on defendant Pennzoil Company's appeal from the order of the Court granting plaintiff Texaco's motion for a preliminary injunction. So Ordered: Brieant, J. m/n
01-17-86	88	Filed transcript of record of proceedings, dated January 9, 1986.
01-17-86	—	The record on appeal in the above entitled proceeding has been certified and transmitted to the United States Court of Appeals for the Second Circuit this 17th day of January, 1986.
01-17-86	89	Fld. Defendant Pennzoil Company AMENDED NOTICE OF APPEAL from the Order, entered on January 16, 1986, granting a preliminary injunction against defendant Pennzoil Company. Mailed copies to Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, New York 10005, Kaye, Scholer, Fierman, Hays & Handler, 424 Park Ave., New York, New York 10022, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10154, Baker & Botts, 3000 One Shell Plaza, Houston, Texas

DATE NR. PROCEEDINGS

77002 and J. Patrick Wiseman, Assistant Attorney General, Chief, State & County Affairs, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

01-21-86 — Forwarded copy of AMENDED NOTICE OF APPEAL to District Judge Brieant and copy of Amended Notice of Appeal and docket entries to Court of Appeals, Second Circuit this date.

01-27-86 90 Fld. the State of Texas, Intervenor AMENDED NOTICE OF APPEAL hereby appeals to the United States Court of Appeals for the Second Circuit from the Preliminary Injunction Order entered on January 16, 1986 in the above styled and numbered cause of action. Mailed copies to Jim Mattox, Attorney General, Mary F. Keller, Assistant Attorney General, Chief, State & County Affairs, P.O. Box 12548, Capitol Station, Austin, Texas, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Ave., NY, NY 10022, Cravath, Swaine & Moore, One Chase Manhattan Plaza, NY, NY 10005, Mr. Irv. Perrell, Baker & Botts, One Shell Plaza, Houston, Texas, 77002 and Mr. Paul Curran, Kaye, Scholer, Fierman, 425 Park Avenue, NY, NY 10022.

01-27-86 — Forwarded copy of AMENDED NOTICE OF APPEAL to District Judge Brieant and copy of Amended Notice of Appeal and docket entries to the Court of Appeals, Second Cir. this date.

01-28-86 91 Fld. Deft's Memorandum in Opposition to Motion to allow Texaco Shareholders to Intervene.

01-28-86 92 Fld. NOTICE OF APPEARANCE for plaintiff, Texaco Inc. Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York 10022

DATE NR. PROCEEDINGS

01-31-86 93 Fld. Reply Memorandum in support of the Motion of John F. Browne, et al., acting individually and as the Texaco Shareholders Protective Committee to Intervene pursuant to Fed. R. Civ. P. 24(b).

02-05-86 94 Fld. ORDER regarding Rule 65(c) Security pursuant to Order dated Jan. 16, 1986. The foregoing collateral has this date been received in my presence by the Clerk of this Court in good negotiable form and ordered impounded this date. So Ordered: Brieant, J. m/n

02-05-86 95 Fld. 1 SEALED AND IMPOUNDED RECORD this date.

02-05-86 96 Fld. LETTER from Francis P. Barron of the law firm of Cravath, Swaine & Moore re: certificates, accompanied by stock powers endorsed in bank evidencing 65 million common shares of Texaco Canada Inc., a Canadian federal corporation whose shares are publicly traded on, among others, the American Stock Exchange. In satisfaction of the requirement in the Court's Order that Texaco submit security in the amount of $1,000,000,000 (One billion dollars). Dated 2-5-86.

LETTER from Francis Barron, dated 1-31-86 concerning rule 65(c) security provision of the Court's Order of 1-16-86. Letter is addressed to Mr. Belnick.

LETTER, dated Feb. 3, 1986 from Mark A. Belnick in response to Mr. Barron's letter dated Jan. 31, 1986 which he received this date.

02-10-86 97 Fld. COPY OF ORDER. Received on Jan. 6, 1986 Check #161,034 dated 2-6-86 in the amount of

DATE NR. PROCEEDINGS

$1,000,000.00 payable to Texaco, Inc., (Robert B. Zwillick) posted to secure the TRO in the above captioned action. (The Clerk of the Court shall return to Texaco the $1,000,000 (One Million Dollars)).

02-13-86 98 Fld. LETTER, dated Jan. 30, 1986 from Tom Bevill, M.C. from the 4th dist. of Ala., re: Amicus curiae

02-19-86 99 Filed transcript of record of proceedings, dated 2-5-86

03-14-86 100 Fld. MANDATE with Opinion attached. Appeal from the United States District Court for the Southern Dist. of NY. This cause came on to be heard on the transcript of record from the U.S.D.C. for the S.D.N.Y., and was argued by counsel. On Consideration whereof, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this Court. A true Copy, Elaine B. Goldsmith, Clerk United States Court of Appeals, for the Second Circuit. E.O.D. 3-18-86

03-18-86 101 Fld. LETTER dated March 4, 1986 from David Berger of the Law Offices of Berger & Montague, P.C. withdrawing motion to intervene filed on behalf of the Texaco Shareholders Protective Committee.

04-04-86 102 Fld. defendant Pennzoil Company ANSWER TO AMENDED COMPLAINT.

04-08-86 103 Fld. ORDER ON REMAND. Pursuant to the mandate of the U.S.C.A. for the 2nd Cir. dated 2-20-86 and filed in this Court on 3-14-86, and

DATE NR. PROCEEDINGS

all prior proceedings, it is hereby Ordered that the Order issued by this Court in this action on 1-16-86 ("the Order"), be amended as follows:

1. The provisions of paragraph 2 of the Order shall expire upon the effective date of any final judgment in Pennzoil Co. v. Texaco, Inc., No. 84-05905 (District Court for the 151st Judicial Dist. of Texas), after exhaustion or expiration of all appellate remedies (whether as of right or discretionary, including expiration of the time in which a motion for rehearing or reconsideration may be heard) in the courts of the State of Texas and the U.S. Supreme Court.

2. A hearing concerning the appropriateness, in accord with the decision of the Court of Appeals, of the security previously posted herein by plaintiff Texaco, Inc. may be held on 24 hours' notice, or such shorter time as the Court may allow, by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available.

3. The first, second, fourth and seventh claims in plaintiff Texaco Inc.'s amended complaint are hereby dismissed for want of subject matter jurisdiction.

4. The making of a scheduling order in this action pursuant to Rule 16(b), Fed.R.Civ.P. is deferred indefinitely, subject to reconsideration upon the application to this Court of any party by notice of motion or on the Court's own motion.

5. No pre-trial discovery shall be taken in this action without the prior leave of the Court. So Ordered: Brieant, J. m/n

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NOS. 86-7046, 86-7052
MR NUMBER 86-8003

TEXACO, INC.,

Plaintiff-Appellee,

—v—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor-Appellant.

Appellee's Counsel

David Boies, Esq.,
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000
(for TEXACO INC)

Paul Curran
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000
(for TEXACO INC)

Appellants' Counsel

Mark A. Belnick, Esq., and
Arthur L. Liman, Esq.,
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000
(for PENNZOIL COMPANY)

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234
(for PENNZOIL COMPANY)

J. Patrick Wiseman
Assistant Attorney General
Chief State & County Affairs
Office of the Attorney General
State of Texas
PO Box # 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120
(for STATE OF TEXAS)

Additional Attorneys

Amicus Curiae:
Hon. Hamilton Fish, Jr.
(& 24 other Members of U.S. Congress
from State of New York)
United States House of Representatives
Washington, D.C. 20515
(202) 225-5441

Amicus Curiae:
Sen. Alfonse M. D'Amato
United States Senate
SH - 520 Hart Building
Washington, D.C. 20510
(202) 224-6542

Amicus Curiae: (State of Alabama)
Charles A. Graddick, Attorney General
Susan McKinney, Assistant Attorney General
11 South Union Street
Alabama State House
Montgomery, Alabama 36130
(205) 261-7406

Amicus Curiae: (State of Wyoming)
A.G. McClintock, Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

Amicus Curiae: (State of New York)
Mario M. Cuomo, Governor
Robert Abrams, Attorney General
Edward V. Regan, Comptroller
State of New York
Department of Law
Two World Trade Center
New York, New York 10047

Amicus Curiae: (State of Oklahoma)
George Nigh, Governor
Kurt G. Glasseo, Counsel to Governor
State of Oklahoma
Office of the Governor
Oklahoma City, Oklahoma

(State of Kansas)
Robert T. Stephen, Attorney General
Wayne E. Hundley, First Deputy Attorney General
Chief, Consumer Protection and Antitrust Division
State of Kansas
Kansas Judicial Center
301 West Chance - 2nd fl.
Topeka, Kansas 66612
(913) 296-3751/2215

Amicus Curiae: (State of Montana)
Ted Schwinden, Governor
State of Montana
Office of the Governor
Helena, Montana 59620
(406) 444-3111

Amicus Curiae: (State of New Mexico)
Harvey Fruman, Counsel to the Governor
Geoffrey Sloan, Chief Attorney
State of New Mexico Energy and
Mineral Department
525 Camino De Los Marquez
Santa Fe, New Mexico 87501
(505) 827-5956

Amicus Curiae: (State of Washington)
Ken Eikenberry, Attorney General
Edward B. Mackie, Chief Deputy Attorney General
Temple of Justice
Olympia, Washington 98504
(206) 753-6207

Amicus Curiae: (Attorney General)
Michael C. Turpen, Attorney General
State of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105

Amicus Curiae: (State of Alaska)
Harold M. Brown, Attorney General
Karen L. Loeffler, Assistant Attorney General
Department of Law
1031 West 4th Avenue
Suite 200
Anchorage, Alaska 99501
(907) 276-3550

Amicus Curiae: (State of California)
John K. Van de Kamp, Attorney General
Andrea Sheridan Ordin, Chief Assistant Attorney General
Michael J. Strumwasser, Special Counsel
to the Attorney General State of California,
acting by and through its Business, Transportation,
and Housing Agency
3580 Wilshire Boulevard
Suite 820
Los Angeles, California 90010
(213) 736-2102

Amicus Curiae:
Hon. Jack Brooks
& 12 other members of U.S. Congress
from State of Texas
United States House of Representatives
Washington, D.C. 20515
(202) 225-6565

Amicus Curiae: (State of Florida)
Jim Smith, Attorney General
Louis F. Hubener, Assistant Attorney General
Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

Amicus Curiae: (NAACP)
Lloyd N. Cutler, Esq.
National Association for the Advancement
of Colored People
186 Remsen Street
Brooklyn, New York 11202
********** (firm)
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Amicus Curiae: (Former Secretary of Treasury)
Henry H. Fowler, Pro-Se
209 South Fairfax Street
Alexandria, Virginia
(703) 836-4638

Amicus Curiae: (Governor and State of Delaware)
Hon. Michael N. Castle, Governor
State of Delaware
Legislative Hall
Dover, Delaware 19001
(302) 736-4101

Amicus Curiae: (Committee of Concerned Employees and
Retirees (Stockholders) of Texaco, Inc.)
Paul N. Silverstein, Esq.
Booth, Marcus & Pierce
79 Fifth Avenue
New York, New York 10003
(212) 620-0300

Amicus Curiae: (Business Council of New York)
Lawrence P. Justice, Esq.
Rice & Justice
96 South Swan Street
Albany, New York 12210
(518) 434-8435

DATE	FILINGS - PROCEEDINGS
01-13-86	Movant PENNZOIL COMPANY, Notice of Motion for Expedited Appeal filed (w/pfs) (orig: Staff Counsel FS)
01-14-86	ORDER granting the movant PENNZOIL motion for expedited appeal to the extent that the record on appeal, the joint appendix and appellants brief shall be filed on or before January 23, 1986; appellees brief shall be filed on or before February 3, 1986; oral argument shall be heard on an expedited basis as early as the week of February 10, 1986, FILED. (By:FS).
01-14-86	Certified copy of the order filed on 1/14 issued to the district court, S.D.N.Y.
01-14-86	Appellant Pennzoil motion for permission to file brief in excess of 50 pages filed
01-15-86	ORDER granting the movant PENNZOIL CO., motion for leave to file brief in excess of 50 pages further noting that brief not exceed 80 pages, FILED. (By: LWP).
01-16-86	Copy of district court docket entries and Notice of Appeal on behalf of the appellant PENNZOIL COMPANY, FILED. (re:86-7046).
01-16-86	Copy of receipt re: payment of the docketing fee in the district court, FILED. (receipt #120540).
01-17-86	Copy of district court docket entries and Notice of Appeal on behalf of the appellant STATE OF TEXAS, FILED. (re:86-7052).
01-17-86	Copy of receipt re: payment of the docketing fee in the district court in docket number 86-7052, FILED.
01-22-86	RECORD ON APPEAL FILED (Original Papers of District Court).

DATE	FILINGS - PROCEEDINGS
01-23-86	Appellant STATE OF TEXAS—Brief RECEIVED (w/pfs) [3 to calendar]
01-23-86	Appellant PENNZOIL COMPANY—Page Proof Brief FILED (w/pfs)
01-23-86	Appellant PENNZOIL COMPANY—Final Form JOINT APPENDIX FILED (w/pfs) [volumes I, II, and III]
01-23-86	Appellant STATE OF TEXAS—Brief FILED (w/pfs).
01-24-86	Appellant PENNZOIL COMPANY brief filed (awaiting proof of service ok to file as per J. Defritas)
01-24-86	Copy of district court docket entries and Amended Notice of Appeal on behalf of the appellant PENNZOIL COMPANY, FILED.
01-24-86	Appellee Texaco motion for leave to file brief in excess of 50 pages filed.
01-28-86	Order granting appellee Texaco motion for leave to file brief in excess of 50 pages filed.
01-30-86	Appellant State of Texas motion for leave to appear pro hac vice (Wiseman) filed.
01-30-86	Appellant State of Texas motion for leave to file addendum filed
01-30-86	Appellant State of Texas addendum received
01-31-86	Movant Hamilton Fish, Jr., etc. motion for leave to file amicus curiae memorandum filed
01-31-86	Movant Hamilton Fish, Jr., etc. amicus curiae memorandum received
01-31-86	Movant Alfonse D'Amato motion for permission to file brief as amicus curiae filed
01-31-86	Movant Alfonse D'Amato brief as amicus curiae received

DATE	FILINGS - PROCEEDINGS
01-31-86	AMICUS CURIAE STATE OF ALABAMA brief filed (w/pfs)
01-31-86	Amicus Curiae STATE OF WYOMING—briefs filed (w/pfs)
01-31-86	Amicus Curiae STATE OF NEW YORK—letter brief filed
01-31-86	Amicus Curiae STATE OF OKLAHOMA—brief filed (w/pfs)
01-31-86	Order granting appellant State of Texas motion for leave to appear pro hac vice filed (endorsed on motion filed 1/30/86)
01-31-86	Order granting appellant State of Texas motion for leave to file addendum filed
01-31-86	Appellant State of Texas addendum filed
01-31-86	Order granting movant Hamilton Fish etc motion for leave to file amicus curiae memorandum filed
01-31-86	Amicus curiae brief of Hamilton Fish etc filed
01-31-86	Order granting movant Alfonse D'Amato motion for leave to file brief as amicus curiae filed
01-31-86	Amicus curiae brief of Alfonse D'Amato filed
01-31-86	Copy of district court docket entries and AMENDED Notice of Appeal on behalf of the appellant STATE OF TEXAS, FILED.
02-03-86	Appellee Texaco, Inc. brief filed
02-03-86	Amicus curiae State of Washington brief filed
02-03-86	Amicus curiae State of Oklahoma brief filed (Attorney General)
02-03-86	Movant Jack Brooks and 12 other members of Congress from the State of Texas motion for leave to file amicus curiae memorandum filed

DATE	FILINGS - PROCEEDINGS
02-03-86	Movant Jack Brooks and 12 other members of Congress from the State of Texas amicus curiae memorandum received
02-03-86	Amicus curiae State of Alaska brief filed
02-03-86	Amicus curiae State of New Mexico brief filed
02-03-86	Amicus curiae State of Montana brief filed
02-03-86	Amicus curiae State of California brief filed
02-03-86	Amicus curiae State of Kansas brief filed
02-03-86	Movant NAACP brief as amicus curiae received (motion received but no affidavit)
02-04-86	Order granting movant Jack Brooks and 12 other members of Congress from the State of Texas motion for leave to file amicus curiae memorandum filed
02-04-86	Amicus curiae Jack Brooks and 12 other members of Congress from the State of Texas brief filed
02-04-86	Amicus Curiae State of Florida brief filed
02-04-86	Movant Henry H. Fowler and 3 other individuals motion for permission to leave to file brief as amicus curiae filed
02-04-86	Movant Henry H. Fowler and 3 others brief as amicus curiae received
02-04-86	Movant NAACP motion for leave to file amicus curiae brief filed
02-04-86	Amicus curiae State of California brief filed
02-05-86	Amicus curiae State of Montana brief filed
02-05-86	Amicus curiae State of Delaware brief filed
02-05-86	Amicus curiae State of Kansas brief filed
02-05-86	Order granting movant NAACP motion for leave to file amicus curiae brief

DATE	FILINGS - PROCEEDINGS
02-05-86	Amicus curiae NAACP brief filed
02-05-86	Order granting movant Henry Fowler & 3 others motion for leave to file amicus curiae brief filed
02-05-86	Amicus curiae Henry Fowler & 3 others brief filed
02-07-86	Amicus Curiae Committee of Concerned Employees and Retirees (Stockholder) of Texaco, Inc. filed (by Booth Marcus & Pierce) on consent
02-10-86	Appellant State of Texas reply brief filed
02-10-86	Appellant Pennzoil Company reply brief filed
02-10-86	Appellant State of Texas motion for leave to appear pro hac vice filed (on behalf of W. Robert Gray)
02-10-86	Movant Business Council of New York motion for leave to file amicus curiae brief out of time filed
02-10-86	Movant Business Council amicus brief received
02-11-86	Order granting Appellant motion for leave to appear pro hac vice filed
02-11-86	Order granting movant Business Council of New York motion for leave to file amicus curiae brief filed
02-11-86	Amicus curiae Business Council of New York brief filed
02-11-86	Case heard before Lumbard, Mansfield, Pierce, C.JJ.
02-12-86	Transcript of oral argument, filed.
02-20-86	Judgment affirmed in part and reversed in part by published signed opinion (Judge Mansfield).
02-20-86	Judgment filed.
	MANDATE (judgment and Opinion) issued to district court.

No. 85-1798 (5)

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

SIMON H. RIFKIND
ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
KENNETH S. GELLER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

September 5, 1986

66 pp

QUESTIONS PRESENTED

The judgment below, which authorized a federal district court to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal, presents the following questions:

1. May a federal court treat an injunction of state court proceedings as "expressly authorized" by 42 U.S.C. § 1983, and therefore exempt from the Anti-Injunction Act, by transforming into "the state" every private litigant who invokes state judicial proceedings and may call on state officers to help enforce the resulting judgment?
2. Having declared that enforcement of a private litigant's state court judgment is actionable under § 1983, may a federal court avoid the comity principles of *Younger v. Harris* by declaring that the state has no cognizable interest in such enforcement proceedings inasmuch as the underlying action is between private parties?
3. Do *Younger* principles permit a federal court to excuse deliberate bypass of judicial remedies in a state's appellate system where there is no procedural bar to full and fair state court consideration of a litigant's constitutional challenges?
4. May a federal district court reward deliberate bypass of state judicial relief from alleged barriers to effective appeal of a trial court judgment by treating a federal suit seeking to stay that judgment pending appeal as "original" rather than "appellate" in nature, and therefore as exempt from the exhaustion requirements this Court respects in considering applications for identical stays?
5. May a federal court intervene in pending state court proceedings to invalidate the state's appellate security provisions on the theory that the Due Process Clause entitles a trial loser to an affordable stay of judgment pending appeal?

PARTIES TO THE PROCEEDING

In addition to the parties who appear in the caption of this case, the State of Texas appeared as Intervenor-Appellant in the court of appeals, pursuant to 28 U.S.C. § 2403(b). Pennzoil Company has no parent company or affiliates as those terms are used in Supreme Court Rule 28.1. Pennzoil's non-wholly-owned subsidiaries are:

National Transit Company

The Eureka Pipe Line Company

Proven Properties, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	x
JURISDICTION	xi
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	xii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. THE ANTI-INJUNCTION ACT FORBIDS ENJOINING PRIVATE LITIGANTS FROM TAKING STEPS TO ENFORCE JUDGMENTS THEY HAVE WON IN STATE TRIALS	12
A. The Holding Below Makes Every Judgment Winner a State Actor Suable Under § 1983	13
B. So Sweeping a View of § 1983 Cannot Have Been Contemplated By *Mitchum v. Foster*	15
II. IN ANY EVENT, THE PRINCIPLES DEVELOPED BY THIS COURT UNDER *YOUNGER v. HARRIS* BAR FEDERAL INTERFERENCE IN PROCEEDINGS DESIGNED TO ASSURE THE COLLECTIBILITY OF STATE COURT JUDGMENTS WHERE SUCH PROCEEDINGS OFFER AN ADEQUATE FORUM FOR THE LITIGANT'S FEDERAL CLAIMS	17

PAGE

A. *Younger* Abstention Cannot Be Escaped In A § 1983 Action By Suing A Private Litigant Rather Than A State Official 18

B. The Other Escape Routes Pioneered By Texaco And Endorsed By the Second Circuit Must Be Closed If *Younger* Principles Are To Be Preserved 23

1. Forecasts of Futility Cannot Substitute For A Procedural Bar..... 23

2. The Only "Extraordinary Circumstances" Posed By This Case Cut *Against*, Not For, Federal Judicial Intervention..... 32

(a) Under *Younger*, "extraordinary circumstances" permit federal intervention only if they render state judicial relief inherently inadequate 32

(b) Texaco's "unusual factual situation" furnishes no principled basis for distinguishing ordinary cases of judgment debtors unable to post bonds 34

III. BASIC POSTULATES OF COMITY AND THE FRAMEWORK LEGISLATED BY CONGRESS FOR THE FEDERAL JUDICIAL SYSTEM PRECLUDE FEDERAL STAYS OF STATE TRIAL JUDGMENTS, IN SUPPOSED AID OF STATE OR FEDERAL APPELLATE JURISDICTION, ABSENT EXHAUSTION OF STATE JUDICIAL REMEDIES..... 36

IV. THE JUDGMENT BELOW PREMATURELY SECOND-GUESSES A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS AND REDUCES THE STATE COURT'S JUDGMENT TO AN EMPTY DECLARATION OF ABSTRACT RIGHTS 45

CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases	PAGE
Allen v. McCurry, 449 U.S. 90 (1980)	41
Ammex Warehouse Co. v. Archer, 381 S.W.2d 478 (Tex. 1964)	28
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	12, 38
Bergman v. West, 262 S.W.2d 435 (Tex. Civ. App.—Waco 1953)	28
Boyle v. Landry, 401 U.S. 77 (1971)	32
Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970)	39
Brown v. Texas, 443 U.S. 47 (1979)	38
Chicago v. Atchison, T & S. F. R. Co., 357 U.S. 77 (1958)	iv
City of New Orleans v. Dukes, 427 U.S. 297 (1976)	iv
Cruz v. Donnelly, 727 F.2d 79 (3d Cir. 1984)	14
Dandridge v. Williams, 397 U.S. 471 (1970)	49
Dennis v. Sparks, 449 U.S. 24 (1980)	15
Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890)	27
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	*passim*
Dombrowski v. Pfister, 380 U.S. 479 (1965)	32
Douglas v. California, 372 U.S. 353 (1963)	47
Edwards v. California, 314 U.S. 160 (1941)	49
Evitts v. Lucey, 105 S.Ct. 830 (1985)	45, 47
Fuentes v. Shevin, 407 U.S. 67 (1972)	14

PAGE

Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985) 39

Gibson v. Berryhill, 411 U.S. 564 (1973) 21

Glenn v. Hollums, 73 S.W.2d 1068 (Tex. Civ. App.—Amarillo 1934) 30

Gras v. Stevens, 415 F. Supp. 1148 (S.D.N.Y. 1976).... 43

Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)..... 41

Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).....38, 39

Hernandez v. Finley, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)..... 25

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... *passim*

Juidice v. Vail, 430 U.S. 327 (1977)..... *passim*

Kahn v. Shainswit, 414 F. Supp. 1064 (S.D.N.Y. 1976) 43

Kenner v. Morris, 600 F.2d 22 (6th Cir. 1979) 43

Kugler v. Helfant, 421 U.S. 117 (1975)..... *passim*

LeCroy v. Hanlon, 29 Tex. Sup. Ct. J. 490 (1986)..... 27

Lindsey v. Normet, 405 U.S. 56 (1972)..... 45

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 47

Louisville & Nashville Railroad Co. v. Stewart, 241 U.S. 261 (1916).....48, 49

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)..... *passim*

Lynch v. Household Finance, 405 U.S. 538 (1972)..... 14

Mann-Gas Transmission Co. v. Osborn Oil Co., 693 S.W.2d 576 (Tex. Civ. App.—San Antonio 1985, No Writ) 29

M.I.C. Ltd. v. Bedford Township, 463 U.S. 1341 (1983) 38

PAGE

Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) 18, 20, 35

Mitchum v. Foster, 407 U.S. 225 (1972) ..... *passim*

Monroe v. Pape, 365 U.S. 167 (1961) 5, 40

Moore v. Sims, 442 U.S. 415 (1979) ..... *passim*

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 39

National Socialist Party v. Skokie, 432 U.S. 43 (1977) 38

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) 20, 48, 49

Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (1975) .. 38

Neebuhr v. Bayer, 502 F. Supp. 1216 (N.D. Ohio 1980) 43

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) 27

New Motor Vehicle Bd. v. Fox, 439 U.S. 96 (1978) 49

North Dakota Pharmacy Bd. v. Snyder's Drug Stores, 414 U.S. 156 (1973) 44

Ohio v. Akron Park District, 281 U.S. 74 (1930) 45

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 21

Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S.Ct. 2718 (1986) 31

Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App.—San Antonio 1980) 27, 28, 29, 31

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 5, 40

Perez v. Ledesma, 401 U.S. 82 (1971) 32

Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969) 31

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 43

PAGE

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) ..... *passim*

Smith v. Murray, 106 S.Ct. 2661 (1986) 25

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 14

Stefanelli v. Minard, 342 U.S. 117 (1951) 11, 36

Sumner v. Mata, 449 U.S. 539 (1981) 41

Svoboda v. Alexander, 3 S.W.2d 423 (Tex. Com. App. 1928) 30

Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) 41

Trainor v. Hernandez, 431 U.S. 434 (1977) 19, 21, 33

United Benefit Fire Ins. Co. v. Metro Plumbing Co., 363 S.W.2d 843 (Tex. Civ. App.—El Paso 1962) 26

Vail v. Juidice, 406 F. Supp. 951 (S.D.N.Y. 1976) 20

Weinberger v. Salfi, 422 U.S. 749 (1975) 49

Williams v. Oklahoma City, 395 U.S. 458 (1969) 47

Yandell v. Tarrant State Bank, 538 S.W.2d 684 (Tex. Civ. App.—Ft. Worth 1976) 26

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

Constitutional Provisions

U.S. Constitution, Fourteenth Amendment ..... *passim*

Texas Const. Art. I. § 13 .....26, 27, 28, 29

Statutes

28 U.S.C. § 1254(2) iv

28 U.S.C. § 1257 ..... *passim*

28 U.S.C. § 1331 iv

28 U.S.C. § 1343 iv

PAGE

28 U.S.C. § 1651 ..... 9, 37, 40

28 U.S.C. § 2101 37

28 U.S.C. § 2283 ..... *passim*

42 U.S.C. § 1983 ..... *passim*

Texas Govt. Code § 22.002 30
§ 22.221 30

Texas Prop. Code Ann. § 52.001 ..... *passim*

Tex. Civ. Prac. & Rem. Code § 65.013 ..... 29, 30

Rules

Fed. R. Civ. P. 62 ..... 3, 16

Texas R. Civ. P. 329b 28

Texas R. Civ. P. 363 28

Texas R. Civ. P. 364 ..... *passim*

Texas R. Civ. P. 365(b) 28

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 20, 1986, is reported at 784 F.2d 1133, and is reprinted as Appendix A.* The opinion of the United States District Court for the Southern District of New York, dated January 10, 1986, is reported at 626 F.Supp. 250, and is reprinted as Appendix D.

---

* The Appendices are bound together with the Jurisdictional Statement.

JURISDICTION

Texaco brought this action for injunctive relief in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, and 1343. The district court (Brieant, J.) granted a preliminary injunction on January 16, 1986, see Appendix B, against enforcement of certain Texas bond and lien statutes, on the ground, *inter alia*, that their application to Texaco would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Appendix D.* The United States Court of Appeals for the Second Circuit, affirming in part and reversing in part, sustained the injunction against the Texas provisions on due process grounds. See Appendix A. The judgment was entered on February 20, 1986, see Appendix F, and the mandate issued on March 13, 1986. Appellant's motion to recall the mandate and to clarify, modify or stay the judgment was denied by the Court of Appeals on March 27, 1986. See Appendix G. Appellant filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Second Circuit on March 21, 1986. See Appendix H. After remand, on April 8, 1986, the District Court entered an amended injunction barring enforcement of Pennzoil's Texas judgment until the completion of all appeals in Texas and to this Court under 28 U.S.C. § 1257. See Appendix C.

The Second Circuit, by affirming the grant of a preliminary injunction against Pennzoil, has conclusively held the Texas supersedeas bond and judgment lien provisions unconstitutional as applied, leaving no federal issue to be resolved below. This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1254(2). *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (per curiam); *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958).

---

* The District Court's Supplemental Findings of Fact are set forth in Appendix E.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, § 2283 of the United States Code provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Texas Rule of Civil Procedure 364 provides:

> (a) *May Suspend Execution.* Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.
>
> (b) *Money Judgment.* When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

Texas Property Code, § 52.001 provides that:

> A first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing.

Texas Const. Art. I, § 13 is reprinted as Appendix K.

42 U.S.C. § 1983 is reprinted as Appendix L.

28 U.S.C. § 1257 is reprinted as Appendix M.

Texas Govt. Code § 22.002 is reprinted as Appendix N.

Fed.R.Civ.P. 62 is reprinted as Appendix O.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1798

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

At issue in this case is the authority of federal district courts, notwithstanding the Anti-Injunction Act and judicially-crafted comity principles, to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal.

The Texas state court trial.

Pennzoil Company sued Texaco Inc. in a Texas state court in February 1984 for intentionally inducing the breach of Pennzoil's binding agreement to acquire 3/7 of Getty Oil Company. In a 4-1/2 month trial, Pennzoil, in the words of the United States Court of Appeals for the Second Circuit (A41),[1]

1. Citations to pages in the appendices to the Jurisdictional Statement will be styled "A ____"; to Texaco's Motion to Affirm, "MTA ____"; and to the record appendix in the court of appeals, "CCA ____."

established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a result Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim.

The jury awarded Pennzoil compensatory damages of $7.53 billion, based on Pennzoil's evidence of what it would cost to replace the vast oil reserves that Pennzoil would have acquired under its lost agreement with Getty. (Texaco introduced no evidence on the issue of damages.) The jury also awarded $3 billion in punitive damages, bringing the total judgment entered on December 10, 1985, including prejudgment interest and costs, to $11.12 billion. (A126-27).

Texas law, like that of most states, provides that a party wishing to appeal from a money judgment "may suspend the execution of the judgment by filing a good and sufficient bond . . . ." Texas R. Civ. P. 364(a). To protect the rights of the prevailing party while the appeal is pending, Texas law, like that of 30 other jurisdictions,[2] provides that the bond equal "at least the amount of the judgment, interest, and costs," *id.* 364(b), "[u]nless otherwise provided by law," *id.* 364(a).

A judgment debtor may appeal in Texas even without posting a supersedeas bond, but the prevailing party may then take steps to enforce its judgment while the appeal is pending. In particular, the judgment creditor may record its judgment in any Texas county and thereby acquire a lien on any property of the judgment debtor located in that county. Texas Prop. Code Ann. § 52.001.

No such threat of immediate enforcement existed with respect to Pennzoil's judgment against Texaco, however (A38), for Paragraph 7 of the judgment included, with the consent of both parties, so-called "stand-still" provisions carefully balanced to protect the interests of both litigants. See Appendix I. These provisions prohibited Pennzoil from taking any steps to

---

2. See n.44 *infra*.

enforce its judgment, and also barred Texaco from transferring or encumbering its assets except in the ordinary course of business, as long as the trial court retained jurisdiction of the case.

During this post-trial period, which lasted 3-1/2 months, through March 25, 1986, Texaco was free to seek further relief in the Texas trial and appellate courts from the appeal bond and judgment lien provisions of Texas law, but it made no attempt to do so. Indeed, to this day, Texaco has never raised in a Texas court its objections to the validity or reasonableness of the Texas bond and lien provisions. Nor has Texaco moved in the Texas courts to obtain suitable alternative security arrangements, notwithstanding the fact that, after the judgment was entered, Pennzoil filed a stipulation (Appendix J) in the Texas trial court waiving its right to a full bond and asking that court to fashion fair and suitable security under standards such as those contained in Fed.R.Civ.P. 62.

Texaco's federal district court action.

Several hours before the Texas court had even entered its judgment, Texaco, which had just given its consent to the stand-still provisions, filed this suit against Pennzoil in the United States District Court for the Southern District of New York (White Plains Division) (Brieant, J.). Purporting to rely on 42 U.S.C. § 1983, Texaco sought immediate appellate review in the federal district court of the merits of the Texas judgment, alleging that the judgment burdened interstate commerce, frustrated various provisions of the Securities Exchange Act, and violated the Full Faith and Credit and Due Process Clauses of the Constitution (Claims 1, 2, 4, 5, and 7). (A5, A11, A57-58). Texaco also alleged that the Texas bond and lien provisions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and deprived Texaco of its federal right of access to this Court under 28 U.S.C. § 1257. (Claims 3 and 6). Texaco asked the district court in White Plains (a) to invalidate these wholly conventional security provisions, (b) to decide for itself what would be suitable

security, and (c) to impose these arrangements on the Texas litigants and the Texas courts by means of an injunction.

On December 17, 1985, Judge Brieant issued a temporary restraining order, and on January 16, 1986, he entered a preliminary injunction prohibiting Pennzoil from "taking any action of any kind whatsoever to enforce or attempt to enforce" its Texas judgment. (A52). The district court ruled that every one of Texaco's claims "raise[d] serious questions" about the "merits of the [Texas] judgment" (A63), that Texaco was likely to be successful in its Texas appeal (A62, A66), that punitive damages should not have been awarded (A64), and that compensatory damages "should in no event exceed $800 million" (A66). The court also held that the Texas statute requiring a supersedeas bond in the full amount of the judgment was unconstitutional as applied to Texaco because it burdened Texaco's right to appeal to the Texas appellate courts and to this Court under 28 U.S.C. § 1257. (A70-71). The district court, concerned that "other creditors of Texaco will . . . run into the courts seeking to perfect security interests higher than that . . . available to Pennzoil" (A77), held that, whatever the size of the appropriate judgment, it "must be secured by assets or obligations at least equal in value. . . ." (A77). Yet because it found the Texas award of damages to be "absurd" (A65), the district court required Texaco to post security of only $1 billion as a condition for injunctive relief (A78), and otherwise left Texaco free to transfer or encumber the assets upon which Pennzoil would have to rely to collect its judgment.

The decision below.

On February 20, 1986, having heard Pennzoil's appeal, the Second Circuit directed dismissal of all of Texaco's claims other than those attacking the Texas lien and bond provisions (Claims 3 and 6), holding that all but those two claims could not be adjudicated by the lower federal courts since they had been litigated in the Texas courts. (A19-20). The court of appeals ruled that district court consideration of these claims

would constitute an impermissible arrogation of appellate power: "reviewability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them." (A20).

But the Second Circuit reached a different conclusion with respect to Texaco's Claims 3 and 6—the claims challenging the Texas bond and lien provisions. The court reasoned that Texaco's deliberate decision *not* to raise the question of the validity of these provisions in the Texas state courts gave Texaco the right to raise that question in a federal court. (A21). It stated that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to bring a federal action rather than sue in state court—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues and take them to the "concurrent" jurisdiction of a federal court. (A21-22). This is permitted, the court concluded, whenever a state court litigant decides *not* to submit to the state courts the issue of the validity of any state rule that is not "inextricably intertwined" (A22) with claims that have been adjudicated in the state courts.

The Second Circuit held that the Anti-Injunction Act, 28 U.S.C. § 2283, was likewise no bar to Texaco's Claims 3 and 6, because these claims were properly brought pursuant to 42 U.S.C. § 1983. Relying upon *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the court below declared that Pennzoil would be acting "under color of" state law if it ever tried to enforce its judgment or obtain security therefor, because those acts "necessarily involve[ ] a panoply of activities undertaken together by Pennzoil and state officials, which constitute joint action for the purposes of § 1983." (A26).

On the other hand, the court of appeals ruled that, although there was "an on-going state proceeding" (A32), the principles of federalism and comity underlying *Younger v. Harris*, 401 U.S. 37 (1971), did not prevent the district court from issuing an injunction against Pennzoil. For the Second Circuit ruled

that Pennzoil—even though held to be an arm of the state for "state-action" purposes—was, for *Younger* purposes, merely a "private litigant" and its dispute with Texaco merely "a suit between two private parties" (A34). An injunction against Pennzoil thus did not prevent action by "any arm of the state" (A34); and neither Texas' interest in "protecting the rights of its citizens to obtain and enforce judgments in the Texas Courts," nor its "interest in the constitutionality of its statutes," was "important" or "substantial." (A32). Moreover, the court reasoned that "an injunction would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided." (A14).

The Second Circuit further held that abstention was not required because, in its opinion, the Texas state courts do not provide "adequate procedures for adjudicating Texaco's federal claims" (A35). Without even addressing most of the Texas avenues of redress pressed by both Pennzoil and the State of Texas, which intervened on Pennzoil's side below (A1, A3), and without identifying a procedural bar to such adjudication, the court simply opined that "[t]here is no assurance" that the Texas appellate courts would grant Texaco an "immediate stay of execution" pending a ruling on the federal claim, nor that they would fix security in an amount that the court of appeals would deem "reasonable." (A37-38).

As to the merits of Texaco's attack on the Texas lien and bond statutes, the Second Circuit concluded, in effect, that the Due Process Clause entitles a civil judgment debtor such as Texaco to an affordable means of staying execution of the judgment against it while pursuing its appeal. The court below thus held that the Fourteenth Amendment prohibits Texas from balancing the needs of trial winners and losers as it sees fit, and from deeming the completion of trial an appropriate occasion for fully securing the winning party against the risk that its victory might prove worthless if and when the trial court's judgment is ultimately affirmed on appeal. The Second Circuit accordingly "declare[d] the Texas lien and bond provisions to be unconstitutional . . . as applied" (A35): "[D]enial

of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted . . . [would] amount[ ] to a confiscation of the judgment debtor's property without due process . . . [and] reduce its appeal to a meaningless ritual[,] [s]ince Texaco would be bankrupt or in liquidation by the time its appeals were decided . . . ." (A44). The Second Circuit proceeded to affirm the district court injunction prohibiting Pennzoil from taking *any* steps in the Texas courts to facilitate the enforcement of its judgment (A47-51), whether by invoking the lien and bond provisions, or by requesting other forms of protection to preserve the status quo.[3]

On March 21, 1986, contending that the decision below threatened to make its state court judgment uncollectible, Pennzoil moved the court of appeals to clarify, modify, or stay its judgment so that Pennzoil would at least be free to ask the Texas courts to extend the Texas trial court's "stand-still" order (see pp. 2-3 *supra*) or otherwise to seek security in Texas apart from the Texas lien and bond provisions. The court of appeals denied this motion on March 27, 1986. See Appendix E.

SUMMARY OF ARGUMENT

The judgment of the court below sanctions an unprecedented intrusion by a federal court into ongoing state court proceedings, breaching the wall of statutes and judicial doctrines erected by Congress and this Court as a barrier to just such intrusions. Despite that barrier, the Second Circuit ruled that a federal district court in New York may entertain a collateral attack on the validity of the application, in a Texas lawsuit, of Texas statutes governing security arrangements

3. Having affirmed federal intervention in Texas judicial proceedings and having sustained the $1 billion bond ordered by the district court, the Second Circuit stated that further proceedings in the district court were "unnecessary" pending the disposition of the Texas appeal. (A48). The district court was to retain jurisdiction solely for the purpose of ruling on "any application with respect to the security terms of the injunction arising out of changed circumstances." (A51).

pending the appeal being pursued in that suit. The court held that the district court may displace those statutes and decide for itself what security is "reasonable" to protect the Texas judgment that Pennzoil won before a Texas jury and judge. The court of appeals turned the law on its head by insisting that the New York federal courts have this authority *because* Texaco deliberately bypassed the state courts and declined to present its constitutional objections in the ongoing Texas litigation.

The district court in White Plains has thus been given carte blanche to supplant the courts of Texas and to exercise continuing supervision over *pendente lite* security arrangements throughout the Texas litigation—preventing Pennzoil, on pain of contempt, from pursuing *any* remedy in *any* Texas tribunal to protect its existing and—unless and until reversed—wholly valid Texas judgment. The Second Circuit accomplished this intrusion by constructing a contrived complex of exceptions to *all* of the statutory and judicially elaborated comity rules that, in combination, embody the overarching principle that the state and federal judicial systems are independent and parallel, both subject to the governance of this Court, but without power—apart from exceptional and rigorously cabined circumstances—to supervise or interfere with each other's proceedings.

The court of appeals first ruled that every state-court judgment winner becomes "an arm of the state" whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged. The court below thus radically expanded the application of 42 U.S.C. § 1983 to the private sector, while simultaneously contracting the application of the Anti-Injunction Act (28 U.S.C. § 2283)—the statute through which Congress, ever since 1793, has voiced its steadfast insistence that the federal courts not interfere with state court proceedings.

Then, in an abrupt about-face, the court of appeals took out of play the judicially-crafted rule of comity expounded in *Younger v. Harris*, on the ground that Pennzoil, having just been ruled a state actor for § 1983 purposes, is magically

transformed into a purely private actor for *Younger* purposes. The court thereby created a capacious zone within which comity is simply inapplicable because *neither* § 2283 *nor* abstention is operative—the former because the federal action seeks relief under § 1983 against a state-court litigant who is deemed to wield the power of the state, and the latter because that same state court litigation is nevertheless said to involve merely private parties and private interests and therefore to be undeserving of comity.

The Second Circuit compounded its corruption of abstention doctrine by excusing Texaco from having to identify any procedural bar preventing it from raising its constitutional objections to the lien and bond provisions in the pending Texas proceedings. Instead, the court below satisfied itself with pessimistic forecasts about how Texas courts would resolve questions that have never been put to them. But there is no reason whatever to assume that the Texas courts, especially in light of the "open courts" guarantee of the Texas Constitution, would have been any less sensitive than the federal judiciary to Texaco's legitimate concerns, or that travelling to a federal court half a continent away represents a more rapid or certain path to a just outcome than would have been available in the Texas judicial system. This Court's decisions permit no such distrust and disdain for state courts as fora fully willing and able to vindicate federal rights.

If Texaco *had* presented in the state courts its constitutional arguments against the lien and bond provisions, then—as the court of appeals of course had to acknowledge—the only federal forum in which Texaco could seek relief from an adverse state ruling would be *this* Court, acting on direct review under 28 U.S.C. § 1257, or a single Justice, granting a stay under 28 U.S.C. § 1651(b) pending the full Court's consideration under § 1257 of a petition for certiorari or an appeal. To avoid the conclusion that the federal district court simply lacked original jurisdiction to issue the stay pending appeal that Texaco sought—in effect, a stay in aid of the appellate jurisdiction of the Texas judiciary or of this Court or both—the court of appeals focused on the fact that Texaco had

carefully *avoided* ever asking the state courts to rule on its constitutional objections to the state lien and bond rules. In this way, the Second Circuit managed to conclude that Texaco's deliberate bypass of the Texas state courts *affirmatively justified* Texaco's excursion to the federal courts, rather than constituting a decisive obstacle to the exercise of federal jurisdiction. What should have been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have denied Texaco access to this Court on *direct* review, was viewed by the Second Circuit as providing Texaco a privileged entree to a federal district court in a *collateral* attack under § 1983. Even though the ultimate federal statutory right the court below claimed to be vindicating was access to this Court under § 1257, it saw nothing inconsistent or impermissible in allowing Texaco to petition a district court, rather than this Court, for injunctive relief in aid of *this Court's* appellate jurisdiction. Whether or not this Court construes its holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), as literally ousting the district court of all original jurisdiction to stay state court judgments in supposed aid of appeals therefrom, no appreciation of the comity principles lying behind those decisions can accommodate the end-run sanctioned by the court below.

The Second Circuit was comforted by its belief that its intrusion into state proceedings was *surgical* in both senses of the word: first, that it was narrow, precise, and limited to the "unique and extraordinary" circumstances of this case, unlikely ever to be repeated; second, that it was intended for the benefit of the patient, inasmuch as federal intervention here improved, rather than disrupted, the operation of the state judicial process.

But what the Second Circuit and Texaco believe makes this case unique is in fact something that has yet to occur at all: a flat insistence by Texas on rigidly enforcing the state's lien and bond rules in the face of an objection *in its courts* as to the supposedly dire results and constitutional iniquity of doing so on facts like these. The point Texaco cannot be permitted to

obscure is that Texaco has *never* given the courts of Texas a chance even to *consider* Texaco's claims, state *or* federal, against such rigid enforcement. Indeed, the *more* this situation can be fairly characterized as unique, the *less* justified is the unsubstantiated assumption—an assumption central to both the decision below and to Texaco's entire case for federal intervention—that the Texas courts would mechanically apply various state rules to these facts, oblivious of Texaco's federal constitutional objections to the state's rules as so applied.

What cannot be deemed unique to this case is the practice of endorsing federal "flanking movement[s] against the system of State courts," *Stefanelli v. Minard*, 342 U.S. 117, 123 (1951)—a practice that, if warranted on these facts, must be deemed warranted in a wide range of situations. It would be unprincipled and lawless to permit the court below to excuse its departure from precedent by saying, in effect, "only for Texaco." And it would be imprudent to suppose that other "exceptions" will not be made for other litigants.

Nor are the Second Circuit's good intentions any justification for displacing state tribunals as guardians of their own appellate processes. It is condescending to presume that state courts are in need of such strong medicine, and insensitive to suppose that federal district courts should feel free to make a state's judiciary swallow such a bitter pill.

Apparently displeased by what it deemed to be an excessive award of damages against Texaco, and aghast at what it imagined to be the prospect of Texaco's imminent collapse and the consequence of widespread economic distress, the court below promoted the virtues of quick action, brushed aside the principles of comity, and reacted to imagined calamities that either need never occur at all or, if they are to occur, inhere in the very magnitude of Texaco's adjudicated wrong and in the very fact of *ever* enforcing the resulting verdict in Pennzoil's favor. But tomorrow, when the shouting and the tumult have died, when the dust raised by this elephantine corporate struggle has settled, and when the billion-dollar figures and other technicolor facts have become the stuff of arbitrageur's anecdotes and litigator's war stories, we will still be a union of fifty

sovereign states, with parallel federal and state court systems. And, if the Second Circuit is not reversed, the damage inflicted on our federalism by this decision will then be painfully apparent and all too permanent.

ARGUMENT

I. THE ANTI-INJUNCTION ACT FORBIDS ENJOINING PRIVATE LITIGANTS FROM TAKING STEPS TO ENFORCE JUDGMENTS THEY HAVE WON IN STATE TRIALS.

For nearly two centuries the Anti-Injunction Act has provided that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act is a linchpin of federal-state judicial relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). The "lines of demarcation" contained in the Act are designed to permit each court system to function "independently of the other with ultimate review in this Court of the federal questions raised in either system." *Id.* The effectiveness of the Act, and thus the integrity of the dual court system, are jeopardized by the Second Circuit's decision in this case.[4]

The Second Circuit held the Anti-Injunction Act inapplicable on the ground that Texaco's due process claim against Pennzoil constituted an action authorized by 42 U.S.C. § 1983 and therefore, under this Court's ruling in *Mitchum v. Foster*,

---

4. Although the injunction issued in this case was directed solely against Pennzoil, the Anti-Injunction Act—like the application of *Younger* abstention principles—"cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line R.R. Co., supra*, 398 U.S. at 297.

407 U.S. 225 (1972), an action in which an injunction is "expressly authorized by Act of Congress." By this holding, the court below effected an unprecedented expansion in the application of § 1983 to private defendants and thereby undermined the command of the Anti-Injunction Act.

A. The Holding Below Makes Every Judgment Winner A State Actor Suable Under § 1983.

For Texaco's federal action to qualify as a § 1983 action, and thus one exempted from § 2283 under *Mitchum v. Foster*, Pennzoil must be deemed "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Relying on *Lugar*, the court of appeals held that Pennzoil fits into this category because, in order to enforce its judgment, "Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets." (A25).

This conclusion radically expands this Court's holding in *Lugar*—itself a decision that had extended the state-action concept. *Lugar* sustained a § 1983 claim against a private party who had invoked a state *pre*judgment attachment statute before *any* judicial proceedings had occurred in the case. The *Lugar* majority repeatedly stressed that the private party's joint action with state officials in that case involved a *pre*judgment attachment procedure, 457 U.S. at 927, 927 n.6, 932, and thus the judicially *un*supervised seizure by an *alleged* creditor of "*disputed* property," *id.* at 933, 941 (emphasis added); the Court twice expressly stated that its holding "was limited to the particular context of prejudgment attachment." *Id.* at 939 n.21; *see id.* at 942.

In equating Texas' *post*-judgment, *post*-jury trial appellate security procedures with *Lugar*'s *pre*-judgment, *pre*-trial, *ex parte* attachment procedures, the Second Circuit ignored the central principle that prevents *Lugar* from being distorted into an all-purpose doctrine transforming *every* state-court judgment winner who seeks enforcement into "the state." When the state delegates to a private person the unbridled power to

interfere with others' property *before* there have been *any* judicial proceedings whatever, exercise of that power is appropriately subjected to the constitutional constraints that bind "the state."[5] But where a private person merely asks the state to help enforce a judgment duly rendered by a jury and confirmed by the trial court, a holding that that private person has become the state simply because he has invoked normal state procedures completely obliterates the distinction between private and state action.

The critical line is between a state delegation permitting private parties "to substitute their judgment for that of [a] state official or body," *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), and a system that allows a private person to invoke public power only after the state has *itself* determined the relevant rights and liabilities. The Second Circuit reasoned that, since "state officials can act only upon Pennzoil's unilateral determination" to collect damages from Texaco (A28), this is not a case in which "the independent judgment of the state judiciary is called into play" (A27-28).

But surely the 4-1/2 month trial that preceded the entry of Pennzoil's judgment involved "the independent judgment of the state judiciary," and this is where the contrast with *Lugar*—and the Second Circuit's error—could not be more plain. The state-court plaintiff in *Lugar* was a state actor because state law abdicated to him the unilateral and unsupervised power to determine, simply by filing a complaint and an *ex parte* attachment petition, *see* 457 U.S. at 924, both that a debt was owed and that security therefor was required pending trial. Pennzoil wields no such power. The determination that Texaco owes Pennzoil damages was made by a judge and jury after a full trial; the decision presumptively to require security for all such judgments was made by the Texas Legislature

---

5. *Lugar* thus falls within the line of cases including *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Lynch v. Household Finance*, 405 U.S. 538 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), which hold that the Due Process Clause requires a fair opportunity to be heard in connection with private creditors' resort to prejudgment attachment, garnishment and replevin procedures.

when it enacted § 52.001 and by the Texas Supreme Court when it promulgated Rule 364; and the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request.[6] The suggestion that Pennzoil is here exercising unsupervised and unilateral official state power can be advanced, therefore, only by completely and artificially severing the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed.

Under the Second Circuit's reasoning, all trial winners who may at some point seek to enforce their judgments become state actors fully subject to the constraints of the Due Process and Equal Protection Clauses and vulnerable to suit under § 1983 with respect to any constitutional claims that can be conjured by disgruntled trial losers. That approach to state action clashes with this Court's basic teaching in *Dennis v. Sparks*, 449 U.S. 24, 28 (1980): "merely resorting to the courts and being on the winning side of a lawsuit" does not make a private party into a state actor under § 1983, any more than merely filing a complaint does. *Accord*, *Lugar*, *supra*, 457 U.S. at 939 n.21.

B. So Sweeping a View of § 1983 Cannot Have Been Contemplated by *Mitchum v. Foster.*

By vastly expanding the application of § 1983 to private conduct, the holding below retroactively pumps new meaning into the exemption authorized by *Mitchum v. Foster* and thereby drastically erodes the force of the Anti-Injunction Act.

---

6. A winning plaintiff like Pennzoil, which the Second Circuit credits with "unilateral" power to make "state officials do [its] bidding" (A28), in truth wields no independent power under Texas law. Pennzoil's role in enforcing its judgment against Texaco is limited to asking the Texas court for a writ of execution and delivering it to a sheriff (*see* A25)—a fact that Texaco concedes. (MTA 1 n.2). And Pennzoil's role in perfecting judgment liens against Texaco is likewise limited to obtaining an abstract of the trial court's judgment from one court clerk and handing it to another for recording and filing (*see* A26)—which Texaco also concedes. (MTA 2 n.3).

That Act by its very terms comes into play only where state judicial proceedings have been instituted. But if the invocation of state judicial proceedings transforms a private litigant into a state actor whose conduct may be challenged under § 1983, then § 2283 will be cannibalized. Even if the Second Circuit's ruling is limited to state-court judgment winners, the result will be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes. Surely that is not what this Court contemplated when it decided *Mitchum v. Foster*, which was a real § 1983 action against a real government officer whose official activities constituted the sort of action at the core of Congress' concern when it "expressly authorized" injunctive relief under § 1983.

In moving that the judgment below be summarily affirmed, Texaco sought to assure this Court that the Second Circuit's state action holding "has *no* impact on the breadth of the § 1983 exception to the Anti-Injunction Act," inasmuch as Texaco *could* have chosen to seek a § 1983 "injunction . . . against the state officials involved in the proceeding." (MTA 19) (original emphasis). Why, then, *didn't* Texaco take that path? Obviously, Texaco sued Pennzoil *instead* of any state official in an attempt to avoid *Younger v. Harris*, 401 U.S. 37 (1971), which would have blocked Texaco's federal foray had it sued "any arm of the state." (A34). *Only* the Second Circuit's expansion of the state action concept enabled it to drive a wedge between the Anti-Injunction Act and *Younger*, creating the opening through which Texaco obtained federal relief *pendente lite*. Nor can the Court derive any comfort from Texaco's astounding suggestion that this case is "narrower than *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)," because "this is solely an injunction action, not a suit for damages" (MTA 20). Texaco has obviously missed the point of the Anti-Injunction Act. That statute has restrained federal power ever since 1793 precisely because *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion.

When asked to expand the coverage of § 1983, courts must consider what the expansion would do to the policies animating the Anti-Injunction Act. Such consideration is entirely

missing from the analysis of the court of appeals. The decision below entices state court judgment losers to mount collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process, thereby ceding to the lower federal courts a large and wholly unjustified zone within which to enjoin pending state proceedings.[7]

II. IN ANY EVENT, THE PRINCIPLES DEVELOPED BY THIS COURT UNDER *YOUNGER v. HARRIS* BAR FEDERAL INTERFERENCE IN PROCEEDINGS DESIGNED TO ASSURE THE COLLECTIBILITY OF STATE COURT JUDGMENTS WHERE SUCH PROCEEDINGS OFFER AN ADEQUATE FORUM FOR THE LITIGANT'S FEDERAL CLAIMS.

Even if the Anti-Injunction Act were held not to bar the injunction issued at Texaco's behest, the "national policy forbidding federal courts to stay or enjoin state proceedings except under special circumstances" would compel the same result here. *Younger v. Harris*, 401 U.S. 37, 41 (1971). In *Mitchum v. Foster*, *supra*, this Court unanimously held that the fact that a case is brought under § 1983 (and thus is exempt from the restrictions imposed by § 2283) does not "qualify *in any way* the principles of equity, comity and federalism that

---

7. The breadth of the injunction affirmed below illustrates the range of federal judicial intrusions portended by the Second Circuit's holding. That injunction enjoins Pennzoil from going to the courts of Texas for *any* form of protection of its interests during the pendency of Texaco's appeal on the merits—even a mere extension of the bilateral stand-still that expired on March 26, 1986. *See* Appendix E. Yet the *only* exception to § 2283 even *suggested* in this case—§ 1983—bears *at most* upon the injunction against the lien and bond provisions, the only Texas laws ever challenged by Texaco. Any bootstrap plea for jurisdiction over *unchallenged* Texas procedures as a means of effectuating the judgment against those that were challenged is powerful evidence that Texaco's purported § 1983 claim against the bond requirement is nothing more than a subterfuge for a collateral federal attack on the Texas judgment itself, resting on undifferentiated disdain and hostility toward the Texas judiciary.

must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243 (emphasis added). Such federal judicial "abstention is based upon the theory that the [would-be federal plaintiff] 'should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.' " *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 435 (1982). The Second Circuit's embrace of the challenges that Texaco has steadfastly refused to present in the courts of Texas is anathema to the principle of comity.

A. *Younger* Abstention Cannot Be Escaped In A § 1983 Action By Suing A Private Litigant Rather Than A State Official.

Central to the Second Circuit's effort to escape *Younger* was the court's ruling that the Texas litigation, being a purely "private" dispute, simply did not involve state interests of a sort that might implicate *Younger*. After classifying Pennzoil as a "state actor" (A27) under § 1983 in order to evade the strictures of the Anti-Injunction Act, the Second Circuit thus changed its mind—and thereby changed Pennzoil's stripes—in an effort to evade *Younger* abstention: it now appeared that no "state official" of any kind was involved in the state court litigation in question (A33). Having previously declared that, for purposes of §§ 1983 and 2283, "Pennzoil cannot be divorced from [the Texas] enforcement procedure merely because a court authorized execution of the judgment" (A26), the court below proceeded to divorce Texas itself from its own enforcement procedures by holding that "the state has no interest in the underlying action" in this case (A34).

The court of appeals, by creating a zone within which *all* rules of comity are rendered entirely inoperative, made nonsense of the law. If Pennzoil is to be deemed "the state" for § 1983 purposes when it seeks to invoke particular state judicial mechanisms, this must be *because* it is a surrogate wielding the *public* powers of the state. But if the public powers of the

state are in fact implicated, *Younger* concerns come into play *for that very reason*: the point of the *Younger* doctrine is to prohibit federal interference with efforts by state courts to effectuate the state's public policies, except in narrowly defined extraordinary circumstances. *Younger* rests on the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. To conclude, as the court below did, that a § 1983 action aimed at displacing the state judicial process for securing a duly-rendered judgment is so "private" that it escapes *Younger* is a contradiction in terms: *by definition* a § 1983 action is an action against *public* authorities to curb the exercise of *public* power—power "under color . . . of state law." For that very reason, sensitivity to concerns of comity becomes imperative.

Apart from the Second Circuit's inconsistent parsing of "state actors" and "private litigants," its refusal to apply *Younger* principles disregarded both the specific holdings and the animating philosophy of this Court's cases in the *Younger* line. The court of appeals gave a narrow and wooden interpretation to prior abstention precedents despite this Court's express admonition that "the principles of *Younger* and *Huffman* are not confined solely to the type of state actions which were sought to be enjoined in those cases," *Juidice v. Vail*, 430 U.S. 327, 334 (1977). The "vital consideration" underlying *Younger* and its progeny is the "notion of 'comity,' that is, a proper respect for state functions," *Younger*, 401 U.S. at 44, "which counsel[s] against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts." *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

Thus, in *Juidice v. Vail*, *supra*, this Court applied *Younger* abstention to a federal plaintiff who was, like Texaco, a state court judgment debtor. There, as here, the judgment was entered in a *purely private* civil lawsuit. There, as here, the federal claim was a § 1983 action challenging state laws and procedures enabling a successful plaintiff to protect his interest in the judgment—in that case, by moving for contempt in the

event the adjudged debtor failed to honor a privately-issued subpoena to appear for a privately-taken deposition about the existence of assets sought in satisfaction of the judgment. 430 U.S. at 329-30.

The Second Circuit's conclusion that "[h]ere the state has no interest in the underlying action" (A34) would have been just as apt—or inapt—in *Juidice*, where New York had no particular interest in the private financial dispute underlying the privately-taken deposition and the privately-issued subpoena. But just as New York had a substantial interest—one requiring federal abstention—in "civil contempt proceedings . . . initiated by private parties to enforce compliance with subpoenas issued by private attorneys," *Vail v. Juidice*, 406 F.Supp. 951, 958 (S.D.N.Y. 1976), so Texas has a vital interest in the functioning and enforcement of its bond and lien laws, "process[es] through which [it] vindicates the regular operations of its judicial system," *Juidice v. Vail*, 430 U.S. at 335. Texas' *pendente lite* security scheme, like New York's privately-initiated contempt process, exists to make state court judgments collectible: it "stands in aid of the authority of the judicial system, *so that its orders and judgments are not rendered nugatory.*" *Id.* at 336 n.12 (emphasis added).[8]

Pennzoil does not contend that Texas has any special interest in this particular judgment or in the underlying dispute between Pennzoil and Texaco. Rather, the "state's substantial interest in th[is] litigation" arises from the "[p]roceedings necessary for . . . the functioning of the state judicial system." *Middlesex Ethics Comm.*, 457 U.S. at 432. Surely Texas' judicial procedures for accommodating the competing interests of judgment debtors and creditors pending appeal serve a

---

8. Texaco itself concedes that "a state court has 'inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution.' " (MTA 12 n.22) (quoting *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954)). In the *Marine Cooks* case, where dismissal of a state appeal for failure to post proper security was upheld as a means of "sustaining the effectiveness of a state's judicial process," 348 U.S. at 45, this Court noted the importance of a state's interest in averting "frustration" of its judgments, *id.* at 44.

"legitimate state function," *Trainor v. Hernandez*, 431 U.S. at 441. How to order those countervailing interests—and how best to adjust a generic statutory rule to unusual circumstances—are issues in which the State of Texas, as well as the parties in any given case, has a very significant interest.[9] And equitable principles of comity and federalism "are designed to allow a State an opportunity to 'set its own house in order' " when the federal issue can be raised and resolved in pending state proceedings. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80 (1977).

The court of appeals opined that to allow *Younger* to operate here "would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum* that federal courts are empowered by § 1983 to enjoin ongoing state proceedings." (A32). But the unanimous *Mitchum* opinion itself made absolutely clear that *Mitchum* is not in any way "undermined" by the applicability of *Younger*; in fact, the Court *justified* its conclusion in *Mitchum* by noting that *Younger* comity principles will be fully operative precisely when § 2283 is not. 407 U.S. at 243.[10] *Mitchum* unmistakably

---

9. Indeed, the State of Texas intervened as an appellant below. (A1, A3).

10. The resulting application of abstention principles in such circumstances would not in the least imperil the vitality of § 1983, inasmuch as *Younger*, like the Anti-Injunction Act itself, admits of several important exceptions. Specifically, since its first modern incarnation in the *Younger* decision, abstention doctrine has been held *not* to bar federal judicial interference in state court proceedings in the face of prosecutorial bad faith, *see Younger*, 401 U.S. at 47-48, 54, harassment by state officials, *id.*, biased state tribunals, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975); *see also Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), or similar instances of "official lawlessness in a statute's enforcement" or "perversion of the very [state] process that is supposed to provide vindication." *Younger*, 401 U.S. at 56 (Stewart, J., joined by Harlan, J., concurring). These exceptions cover the very circumstances that were believed by the authors of the Civil Rights Act to require a federal judicial remedy that would not only operate independent *of* the state courts, but also *against* those courts: "Proponents of the legislation noted that state courts were being used to harass and injure individuals [and that] state courts were . . . [sometimes] in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster*, 407 U.S. at 240.

stands for the proposition that, in *real* § 1983 actions seeking to enjoin *real* state officials and agencies from litigating in state courts, *Younger* is fully applicable. Yet the court below held that, when a self-styled § 1983 action is instead brought against *private* persons, federal injunctions may be granted entirely without comity constraints. This has the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies.

When combined, the Second Circuit's § 1983 and *Younger* holdings threaten to spawn an entirely new and populous breed of federal lawsuits aimed at the actions of ordinary citizens and corporations who happen to have garnered an enforceable judgment in a state court. Since fundamental principles of comity do not apply in the no-man's land inhabited by this species of litigation, nothing remains to prevent such lawsuits from repeatedly disrupting pending state judicial proceedings.[11] The Second Circuit's holding that *Younger* is entirely inapplicable to this case thus contravenes this Court's governing cases and creates an alarming gap in fundamental principles of comity.

---

11. The Second Circuit's assault on private state court litigation cannot be limited to issues surrounding security pending appeal. The state statute books are stuffed with procedural and structural rules governing the judicial processing of private disputes, and the law reporters are filled with cases attacking the fairness and reasonableness of such rules and alleging that their enforcement would work irreparable harm. Under the Second Circuit's ruling, all these issues are easy prey to federal collateral attack during on-going state proceedings; all that is needed is a bit of artful pleading to make it appear that the federal defendant is suable under § 1983 because his invocation of state judicial proceedings—whether before or after judgment—converts him into a state actor. Since that makes the Anti-Injunction Act inapplicable and since, under the ruling below, *Younger* is also inapplicable, the road is clear for wide-scale evasions of this Court's comity rulings.

B. The Other Escape Routes Pioneered By Texaco And Endorsed By the Second Circuit Must Be Closed If *Younger* Principles Are To Be Preserved.

1. *Forecasts of Futility Cannot Substitute For A Procedural Bar.*

The Second Circuit held that, in the circumstances of this case, compliance with *Younger* requirements was also excused because the Texas state courts do not provide adequate procedures for the adjudication of Texaco's federal claims. (A35). In assessing this conclusion, it is essential to remember that, to this day, Texaco has made *no attempt whatsoever* to raise its objections to the application of the Texas lien and bond provisions in the Texas courts. The Second Circuit freely acknowledged that its dire predictions of irreversible economic harm to Texaco could not come to pass until the expiration of the stand-still order in Paragraph 7 of the judgment. (A38). Texaco thus had 3-1/2 months (A7-8 & n.3) to obtain from the trial court a ruling on the construction and constitutionality of the lien and bond provisions and, absent a favorable ruling, to seek review in the Texas appellate courts, either by expedited direct appeal or by mandamus (A10). In fact, it is "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. at 337 (original emphasis). Texaco's "failure to avail [itself] of such opportunities does not mean that the state procedures were inadequate." *Id.* Yet the Second Circuit nevertheless concluded that it was unreasonable to ask Texaco initially to present its complaint about a Texas rule to the Texas court in which it was currently litigating. (A37-38).

The gravamen of Texaco's argument, accepted by the court below, is not that it could not have *raised* its constitutional challenge in the Texas courts, but that such a challenge would probably have failed since, says Texaco, none had ever succeeded in the past. The Second Circuit's conclusion about the inadequacy of Texas procedures is based on nothing more than

distrustful *speculations* about Texas law and Texas courts. Thus, the court below opined that it "appears unlikely" that Texaco "could have been assured" of a timely decision on the constitutional issues by the Texas trial court (A35), and that there was "no assurance" that the Texas appellate courts would have fixed security in an amount the Second Circuit would deem "reasonable" (A37-38). The Second Circuit further speculated that seeking relief from the bond requirement in Texas would have been futile since the rule had consistently been enforced "as written," and therefore "the Texas trial judge would in all probability deny relief sought on constitutional grounds." (A36).

This argument is as fallacious as it is familiar. The appellee in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), like Texaco, contended that recourse to state remedies should not be required because such efforts would be "futile" and "doomed to failure." *Id.* at 610. The appellee in *Huffman* based its argument on a state case that had upheld rigid application of the statute in question but that had "absolutely nothing to say with respect to appellee's" federal constitutional challenge. *Id.* Here, Texaco and the Second Circuit rendered their verdict of "inadequate" based on Texas decisions routinely fleshing out what constitutes a "full" bond but saying *absolutely nothing* with respect to *any* sort of challenge to the bond rule, let alone a challenge along the federal constitutional lines pressed by Texaco.[12] And in *Huffman* this Court flatly rejected the proposition that the "considerations of comity and federalism which underlie *Younger*" permit the abstention requirement to be "truncat[ed]" merely "because the losing party in the state court of general jurisdiction believes that his chances of success . . . are not auspicious." 420 U.S. at 610.[13]

---

12. These wholly inapposite Texas cases are collected by the court below at page A9 of its opinion.

13. Indeed, in the parallel context of federal habeas corpus, even the existence of a prior state supreme court decision rejecting the precise argument in question will not excuse a federal plaintiff's failure to first raise

The "only pertinent inquiry" is *not* how the Texas courts might rule but whether "state procedural law *barred presentation* of [Texaco's] claims." *Moore v. Sims*, 442 U.S. 415, 430, 432 (1979) (emphasis added). In the absence of such a bar, *Younger* abstention is required—and may not be evaded on the basis of self-serving predictions that recourse to the state courts would be "futile."[14] The requisite procedural barrier does not exist in this case, and the Second Circuit did not even suggest otherwise. Indeed, the only "barrier" to prompt and adequate state relief appears to be Texaco's adamant refusal to give the Texas courts an opportunity to address Texaco's challenge to the lien and bond provisions.[15] There is no

---

the argument in pending state proceedings. " 'Allowing criminal defendants to deprive the state courts of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with . . . principles of comity . . . ." *Smith v. Murray*, 106 S.Ct. 2661, 2666 (1986). "[I]t is the very prospect that a state court 'may decide, upon reflection, that the contention is valid' that undergirds the established rule that 'perceived futility alone cannot constitute cause.' " *Id. A fortiori*, the Second Circuit cannot evade the demands of comity in this case by endorsing Texaco's forecasts of futility, since no court in Texas has ever considered, let alone rejected, the constitutional claims asserted by Texaco against the lien and bond provisions.

14. Texaco errs in relying on *Hernandez v. Finley*, 471 F.Supp. 516 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979), for the proposition that something less than a "procedural bar" to raising one's federal claims will suffice to suspend the abstention requirement. (MTA 26 n.51). As this Court has itself observed, *Moore v. Sims*, 442 U.S. at 426 n.9, the three-judge court in *Hernandez* in fact found just such an absolute procedural bar to the raising of a constitutional challenge. *See* 471 F.Supp. at 519.

15. Texaco argues that it tried to "confer" with the Texas trial court about the severity of the financial crisis allegedly caused by the entry of judgment, only to be rebuffed by that court and opposed by Pennzoil. (MTA 4). Texaco fails to mention that this "conference"—which it requested on December 13, 1985, three days *after* it sought injunctive relief and appellate review of the Texas judgment in the federal district court in White Plains—would have concerned only alleged "uncertainties" in the Paragraph 7 "stand-still" arrangement, and not the state or federal constitutionality of

indication that the Texas trial or appellate courts could not have fashioned an arrangement like the stand-still order pending appeal, whether or not those courts held Pennzoil to its express stipulation in the Texas trial court that it would not invoke any alleged right, under Texas law, to demand an appeal bond in the full amount of the judgment.[16]

In fact, the Texas courts have, from the outset, stood fully prepared to consider Texaco's claim that the state's lien and bond provisions, if rigidly applied, would effectively deny Texaco its state-created right to appeal from the trial court's judgment. Indeed, the Texas Supreme Court has repeatedly and emphatically held that the "open courts" provision of that State's own Constitution, Art. I, § 13, *see* Appendix K, *requires* a Texas court to suspend the literal operation of any statutory or other condition that, as a practical matter, renders

---

applying the lien and bond provisions to Texaco. (A10). Texaco also elides the fact that it submitted its "request" for this "conference" by *letter* rather than by motion or petition, as if it were litigating *in forma pauperis*, and the fact that Texaco failed to repond to requests by both Pennzoil and the Texas trial court that Texaco comply with the Texas Rules of Civil Procedure if it wished a hearing. (*See* District Court Findings Nos. 82, 85-87, A101-02).

16. The Second Circuit denigrated Pennzoil's waiver of its state-created right to a full bond as a mere "unilateral request" to the Texas trial court to determine security pending appeal by applying the standards of Fed.R.Civ.P. 62. (A48). Yet if the challenged Texas lien and bond provisions indeed operate only upon Pennzoil's "unilateral determination" (A28), it is unclear at best how the Second Circuit found any Article III "case" or "controversy" over Pennzoil's hypothetical invocation of those provisions against Texaco, since Pennzoil expressly *waived* whatever "unilateral" rights those provisions conferred upon it. Pennzoil's waiver, duly filed in the Texas trial court as a "stipulation" pursuant to Texas practice (Appendix J), is effective as a matter of Texas law to bind Pennzoil. The lien and bond provisions were intended for the benefit of judgment creditors such as Pennzoil, and their waiver obviously does not adversely affect the rights of the judgment debtor—just the opposite. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684 (Tex.Civ.App.—Ft. Worth 1976); *United Benefit Fire Ins. Co. v. Metro. Plumbing Co.*, 363 S.W.2d 843 (Tex.Civ.App.—El Paso 1962). Even the district court recognized that "consent" by Pennzoil would remove the alleged constitutional defect in the lien and bond statutes. (A68, A75).

unavailable the access to appellate courts that Texas law guarantees. Thus, in *Dillingham v. Putnam*, 109 Tex. 1, 5, 14 S.W. 303, 305 (1890), the court stated:

> "[A]n Act of the Legislature which makes the right . . . to prosecute an appeal . . . depend on the giving of a supersedeas bond, without reference to the ability or inability. . . to give such bond, is violative of the [Texas] Constitution."

See Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984) (reaffirming *Dillingham*).[17]

This principle lives in Texas practice as well as theory. In *Pace v. McEwen*, 604 S.W.2d 231 (Tex.Civ.App.—San Antonio 1980), the Texas intermediate appellate court enjoined enforcement of a trial court order just ten days after entry because that order, requiring a judgment debtor to turn over real estate for sale in satisfaction of a money judgment, effectively rendered the appeal meaningless. The *Pace* court viewed its injunction as necessary to preserve its own appellate jurisdiction, *id.* at 232-33, and further held that the trial court itself had the power to grant the same injunctive relief "to prevent damage to an appellant," *id.* at 233.

The Second Circuit dismissed the Texas "open courts" guarantee and the rule announced in *Dillingham* by assuming that they protected only the abstract right to appeal as such, and could not be applied to stay enforcement of a judgment

---

17. In its most recent statement on this subject, the Texas Supreme Court avowed that "state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of that movement." *LeCroy v. Hanlon*, 29 Tex.Sup.Ct.J. 490, 492 (July 2, 1986). In particular, the "open courts provision specifically guarantees all litigants the right to redress their grievances—to use a popular and correct phrase, the right to their day in court." *Id.* at 493-94. In *LeCroy*, the Texas Supreme Court struck down a law raising the state district court filing fee from $98 to $173 on the ground that, since $40 of the fee went to general revenue, not court-related expenses, the state had not fulfilled its burden of "show[ing] that the legislative purpose outweighs the interference with the individual's right of access." *Id.* at 494.

pending an appeal. (A31 n.12). But the *Pace* decision, which was argued to the court below, clearly demonstrates the Second Circuit's misunderstanding of Texas law. Texaco has likewise belittled the State's "open courts" guarantee and, in urging summary affirmance of the judgment below, palmed the issue in a footnote and argued that *Pace v. McEwen* actually proves that Texas remedies would have been too little, too late. (MTA 27 n.53).

Texaco's claim that Texas remedies are inadequate—a claim without which Texaco's entire case crumbles—is built upon a series of flat misrepresentations of Texas law. If Texaco and the Second Circuit had made any real effort to take the state's law seriously, they would have found that there are several expeditious avenues by which Texaco could have obtained a stay of the judgment while presenting a challenge to the lien and bond provisions.[18] *First*, like the judgment debtor in *Pace v. McEwen*, Texaco could have sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond.*[19] Tex.R.Civ.P. 365(b) provides that "the appellate court may review for excessiveness the amount of the

---

18. Texaco nowhere denies that, even without posting a supersedeas bond, it still had *3-1/2 months* in which to ask the Texas courts for relief. Texaco filed its federal injunction action on December 10, 1985—before the Texas judgment had even been *entered*—even though the stand-still agreement to which Texaco had that very day consented ensured that Texaco need fear no enforcement of the judgment or attachment of liens until mid-March of 1986. (Appendix I; A127).

19. Urging summary affirmance, Texaco told this Court that it would have had to waive its new trial motion in order to perfect an appeal and to petition the appellate court for such relief in mid-December of 1985. (*See* MTA 27 n.53). That is simply not so. It is black letter law in Texas that Texaco could have perfected its appeal by filing a very small cost bond (*not* a supersedeas bond) on the very day the trial court entered judgment, *see* Tex.R.Civ.P. 363; and "if a motion for new trial is timely filed by any party, the trial court, *regardless of whether an appeal has been perfected*, has plenary power to grant a new trial . . . ." Tex.R.Civ.P. 329b(e) (emphasis added). *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex.Civ.App.—Waco 1953).

[supersedeas or cost] bond or deposit fixed by the trial court and may reduce the amount if found to be excessive." Under Texas law, "the trial court is not authorized to set a bond which would be grossly inequitable; to do so would seriously interfere and in fact often defeat the right of appellant to suspend the judgment pending appeal." *Mann-Gas Transmission Co. v. Osborn Oil Co.*, 693 S.W.2d 576, 577 (Tex.Civ. App.—San Antonio 1985, no writ).

Second, the Texas trial court itself, in the words of the Chief Justice of the Texas Court of Civil Appeals, is *also* "vested" with the power "to grant a temporary injunction to prevent damage to an appellant," when enforcement of a civil judgment would render the right to appeal "meaningless," *Pace, supra*, 604 S.W.2d at 233, 232.[20]

Third, a Texas trial court has *explicit statutory power* to "stay a judgment" if the complainant can show himself "equitably entitled to be relieved against" part or all of that judgment. Tex.Civ.Prac.& Rem.Code § 65.013. Contrary to Texaco's contention that such relief will not lie if the judgment debtor has not filed a supersedeas bond in compliance with Tex.R.Civ.P. 364 (MTA 27 n.53), Rule 364 itself, *as amended in 1984*, explicitly recognizes that in appropriate circumstances other statutes may govern the suspension of a judgment.[21] Neither the amending language to Rule 364(a) nor the "open courts" guarantee of the Texas Constitution has ever been

---

20. Contrary to Texaco's recent misrepresentation in urging summary affirmance, the judgment at issue in *Pace* was *not* a "judgment . . . for recovery of specific real property." (MTA 27 n.53). The Texas appellate court there enjoined a "forced sale" of real property that had been ordered to satisfy "a *money* judgment," 604 S.W.2d at 232 (emphasis added)—precisely the sort of judgment Pennzoil has been awarded against Texaco. The case thus sounded in Rule 364(b)—the rule applicable to money judgments—and is therefore directly on point.

21. The language of the first paragraph of the rule was broadened in 1984 to provide that execution of a judgment may be suspended only by the filing of a full supersedeas bond, "[u]nless otherwise provided by law . . . ." Tex.R.Civ.P. 364 (a). Tex.Civ.Prac.& Rem. Code § 65.013 *does* "otherwise provide[ ]."

raised or addressed in any adjudication involving the Texas supersedeas bond requirement. Texaco's only authorities (*see* MTA 27 n.53) for the proposition that § 65.013 cannot be applied to mitigate the full bond requirement of Rule 364 pre-date the 1984 amendment by half a century and are in any event utterly irrelevant: neither case involved a constitutional challenge such as Texaco's; in neither case did the judgment debtor argue that the required bond would be unaffordable or unnecessary; and—contrary to Texaco's belief—neither case was governed by the "statutory predecessor to § 65.013" (MTA 27 n.53).[22]

Both Pennzoil and the Attorney General of Texas explained these state remedies at length to the court below, but they were dismissed out of hand[23] on the basis of the Second Circuit's

---

22. The judgment debtors in Texaco's first authority, *Glenn v. Hollums*, 73 S.W.2d 1068 (Tex.Civ.App.—Amarillo 1934), sought to enjoin a judgment on the basis of an entirely distinct Depression-era foreclosure moratorium statute, *id.* at 1069, and the court held that "all rights in this suit which the [judgment debtors] have, if any, exist solely and alone in virture of the [moratorium] statute . . . ." *Id.* at 1070. And in *Svoboda v. Alexander*, 3 S.W.2d 423 (Tex.Com.App. 1928), which did not even involve any issue relating to a supersedeas bond, a temporary injunction against enforcement of a judgment was in fact *granted* by the trial court. *Id.* at 424. To the extent that Texas law could be read Texaco's way, *Younger* abstention would give the Texas courts an opportunity to construe ambiguous state rules so as "intelligently [to] mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. at 429-30. But in fact Texaco has yet to produce even *arguable* support for its mechanical reading of Texas law.

23. The only state remedy that the Second Circuit deigned to discuss was the possibility of a petition to the Texas Supreme Court for a writ of mandamus, Tex. Gov't Code, § 22.002(a) (1986), reprinted in Appendix N. (A36-38). The court below parsed Texas cases and statutes and found, not the absolute "procedural bar" required by *Moore v. Sims*, 442 U.S. at 430-31 n.13, but a route that offered "no assurance" that a Texas Court would fix security in what the Second Circuit deemed "a reasonable amount." (A37-38). The Second Circuit's superficial reading of Texas law errs on several counts. *First*, since the amendments of 1983, Tex.Govt.Code § 22.221(b) authorizes the intermediate appellate courts, as well as the Supreme Court of Texas, to issue "all writs of mandamus" even when their jurisdiction is not threatened. *Second*, contrary to the Second Circuit's statement (A38), a writ

assumptions (1) that the Texas courts could not act within the 3-1/2 month stand-still period and (2) that the Texas courts would, if asked, simply refuse to safeguard federal and state constitutional rights and would instead mechanically apply the supersedeas bond rule as written.[24] As to the former assumption, *Pace* confirms that the Texas appellate courts are indeed fully capable of hearing and deciding Texaco's petition for relief from Rule 364 with whatever speed might be needed.[25] And as to the latter, there is absolutely no basis for assuming that the courts of Texas, intimately familiar with this state court tort litigation, would be any less able or willing than a federal court half a continent away promptly to address and fairly to resolve all of Texaco's claims of peculiar unfairness and unique hardship.[26] Unless, of course, one starts with the

---

of mandamus will issue to direct a trial court to enter a particular order providing particular relief. *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969). The court below relied on a 115-year-old case in reaching the opposite conclusion (A38), even though that ancient case was expressly characterized as out-dated by the Texas Supreme Court in the *Pope* decision, from which the Second Circuit itself quoted at length. *Third*, the Second Circuit's conclusion that mandamus, like other proposed state remedies, would be inadequate inasmuch as Rule 364's bond requirement is mandatory and a trial court cannot fruitfully be asked or ordered to act beyond its statutory discretion, rests on a dubious premise: "it would seem an unsual doctrine . . . to say that a [state tribunal] could not construe its own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718, 2724 (1986). If the supreme law of the land requires that Rule 364 be modified as applied to these facts, then a trial court of general jurisdiction certainly has the power to do so, and mandamus would certainly lie to compel that course of action.

24. In support of this prediction, the Second Circuit cited only irrelevant Texas cases routinely applying rule 364. (A9). *See* n. 12 *supra*.

25. The Texas Court of Appeals in *Pace* enjoined enforcement of a trial court judgment just ten days after it had been entered. 604 S.W.2d at 231-32.

26. As to the hardship claims in particular—e.g., the thousands who would supposedly lose their jobs were Texaco to have to post a full bond or pay its judgment in full (A40)—a Texas court, if persuaded that Texaco employees or suppliers would by some odd turn of events not be retained by a reorganized Texaco, would obviously take into account Texaco's argument

premise "that state court judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue*, 420 U.S. at 611. Such a premise is impermissible.

2. *The Only "Extraordinary Circumstances" Posed By This Case Cut* Against, *Not For, Federal Judicial Intervention.*

In defending its refusal to require federal abstention, the court below made much of the "unique and extraordinary circumstances" of this case. (A35, A38, A39-40). Texaco likewise belabors this point (MTA 25-26), obviously hoping to fit within this Court's observation that there may be cases whose "extraordinary circumstances" make abstention inappropriate. *See, e.g., Moore v. Sims*, 442 U.S. at 432-33. But that catch-phrase provides no excuse for the federal interference in state proceedings upheld by the court below.

(a) Under *Younger*, "extraordinary circumstances" permit federal intervention only if they render state judicial relief inherently inadequate.

Federal equitable intervention in state proceedings may well be appropriate upon "a showing of 'bad faith' or 'harassment' by state officials responsible for the prosecution," *Kugler v. Helfant*, 421 U.S. 117, 124 (1975),[27] or upon a demonstration

---

that due process compels some bending of the lien and bond rules on such facts. Yet those dire consequences can find a comfortable home only in the imaginations of Texaco and of the court below, not in sound economic theory or in modern industrial reality. If Texaco were forced to sell assets or divisions in order to satisfy the Texas judgment, Texaco's property, far from being destroyed, would merely be transferred to new owners. And Texaco's employees, far from being thrown out of work, would merely find themselves working for a new employer. In any event, it is a strange notion of law that counsels bending principles of judicial federalism to effectuate a supposedly desirable allocation of economic resources.

27. Typical examples of such bad faith include those state prosecutions under obscenity laws, *see, e.g., Perez v. Ledesma*, 401 U.S. 82, 85 (1971), or anarchy or public disorder statutes, *see, e.g., Younger v. Harris*, 401 U.S. at 47-48; *Boyle v. Landry*, 401 U.S. 77, 80-81 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965), in which no conviction is hoped for and in which it is the prosecution in and of itself that constitutes a constitutionally cognizable injury to First Amendment rights.

that the state law in question is " 'flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph.' " *Younger v. Harris*, 401 U.S. at 53. Obviously, neither of those exceptions applies here.[28] But those examples reveal what this Court has definitively declared: that the underlying concern—in extraordinary as well as mundane circumstances—is with the ability of pending state proceedings to provide an adequate hearing on the complainant's federal claims. The deference to state proceedings mandated by the rules of comity and federalism may be relaxed "[o]nly if 'extraordinary circumstances' *render the state court incapable* of fairly and fully adjudicating the federal issues before it." *Kugler v. Helfant*, 421 U.S. at 124 (emphasis added); *Moore v. Sims*, 442 U.S. at 433; *Trainor v. Hernandez*, 431 U.S. at 442 n.7.[29]

The circumstances of this case, as described by the Second Circuit, are extraordinary "merely in the sense of presenting a highly unusual factual situation." *Kugler*, 421 U.S. at 125. That is manifestly insufficient to warrant a federal injunction. *Id.* Abstention is in order so long as there has been "no perversion of the very [state] process that is supposed to provide vindication," *Younger v. Harris*, 401 U.S. at 56 (Stewart, J., joined by Harlan, J., concurring), and nothing approaching that has even been alleged here.[30]

---

28. The Texas lien and bond provisions are obviously not criminal statutes; and Texaco challenges them not on their face but only as applied in this particular case.

29. In *Moore v. Sims*, this Court stated that "[t]he most extensive explanation of those 'extraordinary circumstances' that might constitute great, immediate, and irreparable harm is that in *Kugler v. Helfant*, 421 U.S. 117 (1975). Although its discussion is with reference to state criminal proceedings, it is fully applicable in th[e civil] context as well." 442 U.S. at 433.

30. In any event, the existence of "extraordinary circumstances" must be assessed "at the time the state proceedings were enjoined." *Moore v. Sims*, 442 U.S. at 433. Texaco has never denied what even the Second Circuit has admitted (A7-8 & n.3): when the district court in White Plains issued its Temporary Restraining Order on December 17, 1985, Texaco had—even without posting a supersedeas bond—*three-and-a-half months* in which to

(b) Texaco's "unusual factual situation" furnishes no principled basis for distinguishing ordinary cases of judgment debtors unable to post bonds.

The court of appeals purported to limit its decision to "the extraordinary circumstances of this case, which are unlikely ever again to recur," including the large amount of the judgment and the "clear inability" on the part of the judgment debtor to comply with the superseadeas bond requirement. (A50).

It is true, of course, that the size of the judgment against Texaco is unprecedented. But it is no larger, in relation to Texaco's assets (or in relation to Texaco's tort), than thousands of judgments entered against less wealthy parties. In the only sense relevant to the debtor, it could be just as "impossible" for a "Mom-and-Pop" groeery store that had been held liable for $100,000 or even $10,000 in damages in a slip-and-fall tort action to post a bond in that amount as it is for Texaco to secure the Pennzoil judgment. Mom and Pop could easily have net illiquid assets in excess of the judgment, but be unable to post security because of a limited cash flow and the nature of their inventory and other assets. And their appeal from an adverse trial judgment would consequently be "destroyed" no less surely than Texaco claims its own to be, since Mom and Pop could, like Texaco, allege that execution of the judgment before the completion of the appeals process would leave their business—and perhaps even their lives—irreversibly altered.

Such lawsuits and such judgments, accompanied by such circumstances, are commonplace, not "extraordinary." And the Second Circuit's rationale would justify federal judicial intervention whenever a judgment debtor must post a bond—whether its size is set by statute or by a state court's discretion—large enough to threaten that debtor with the same irreversible injury that would accompany immediate execution of the judgment.

---

ask the Texas courts for relief. For the stand-still agreement in Paragraph 7 of the Texas judgment, to which Texaco had consented, ensured that Texaco need fear no enforcement of the judgment or attachment of liens until March 25, 1986.

The only "unique" or "extraordinary" aspect of Texaco's case that distinguishes its situation from these more mundane scenarios is the size of the judgment against it. It is unsurprising that Texaco should plead for a different bond requirement—and a different set of abstention rules—for gargantuan corporations that are in a position to commit massive torts and, consequently, to be assessed enormous damages. What *is* surprising is that the Second Circuit should likewise endeavor to create for this case, and this case alone, a special and more favorable set of rules. For the Rule in Texaco's Case can be limited to Texaco—or to other huge companies with huge judgments against them—only by the most arbitrary and unjudicious fiat.

Indeed, the position advanced by Texaco and adopted by the Second Circuit involves a painfully obvious dilemma: if the burden the Texas bond requirement imposes on Texaco's right of appeal *were* as unprecedented and as uniquely devastating as the court of appeals evidently believed (*see* A39-40), there could be no reason short of blatant mistrust of the Texas courts to assume that those courts would mechanically and blindly apply the bond rule to Texaco's detriment. As Texaco itself stresses, its claim "does *not* attack the *facial* validity of the lien and bond provisions" but argues only "that *application* of the provisions would be irrational in the 'unique and extraordinary circumstances of this case.' (A35)." (MTA 11) (original emphasis). To *presume* that the courts of Texas will simply refuse to consider a federal as-applied challenge when those supposedly "unique" circumstances are called to their attention is unacceptable. For "[m]inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982) (original emphasis).[31] In indulging just that presumption, the

31. As this Court wrote in *Huffman v. Pursue*:

> Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet Art. VI . . . declares that 'the Judges in every State shall be bound' by the Federal Constitution . . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.

420 U.S. at 610-11.

Second Circuit manifested a disrespect for state processes that our federal system cannot abide.

III. BASIC POSTULATES OF COMITY AND THE FRAMEWORK LEGISLATED BY CONGRESS FOR THE FEDERAL JUDICIAL SYSTEM PRECLUDE STAYING STATE TRIAL JUDGMENTS, IN SUPPOSED AID OF STATE OR FEDERAL APPELLATE JURISDICTION, ABSENT EXHAUSTION OF STATE JUDICIAL REMEDIES.

The final excuse for federal intervention proffered by Texaco and the Second Circuit reveals both disdain for the Texas courts and misunderstanding of our carefully articulated federal judicial hierarchy. Texaco argued, and the courts below agreed, that staying the state court judgment pending the completion of all state appeals and of review by this Court under 28 U.S.C. § 1257 "would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided" (A14) and would indeed protect the "federally created right to petition for certiorari."[32] Thus, according to Texaco, federal interference with state proceedings in this case has actually "advance[d] the same interest that every *Younger* case has sought to protect" (MTA 24) and should be welcomed as an aid to this Court. A more condescending notion of federalism, and a more peculiar perspective on the federal judicial system, would be hard to imagine.

The sort of federal judicial missionary work championed by Texaco is no less offensive to state sovereignty and to principles of comity than are the intrusions sought by the most openly opportunistic of litigants. It is therefore unsurprising that, in its *Younger* line of cases, this Court has unanimously rejected the view that "federal judicial action would advance, rather than offend, 'the mutual relationship poignantly described by Justice Black as Our Federalism.' " *Kugler v. Helfant*, 421 U.S. at 129; *see also Stefanelli v. Minard*, 342

32. Texaco's Third Cause of Action, Amended Complaint ¶ 75 (CCA 331). The court below relied in part on Texaco's Third Cause of action in affirming the district court injunction. (A6, A43-44).

U.S. 117 (1951).[33] But there is no need to rely on the *Younger* line, or indeed even to hold *Younger* applicable here, to expose the fallacy of the notion that an inferior federal court may play the role of clearing the channels of appeal from a state trial judgment, and may do so unhindered by the principle that state judicial remedies must be exhausted.

Even assuming *arguendo* that the federal interference wrought by Texaco's foray to White Plains could ultimately be deemed to have enhanced Texaco's right of appeal in Texas and its right to seek review in this Court, Texaco has not denied—nor could it—that Congress has never conferred upon lower federal courts the power to displace either state tribunals or this Court in protecting either the state appellate process or this Court's appellate jurisdiction.

It is axiomatic that only the court rendering a judgment, and the courts with jurisdiction to hear appeals from that judgment, have power to process such appeals, including power to review and correct procedural barriers that are said to limit the value of those appeals—whether by issuing a stay or otherwise. By Act of Congress, this Court is the only federal tribunal empowered to review state court judgments. 28 U.S.C. § 1257. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). This Court is therefore the only *federal* court that has a relevant appellate jurisdiction to protect or supervise. Congress has furnished this Court with varied means to afford just such protection, *e.g.*, 28 U.S.C. §§ 1257(3), 1651, 2101(f), 2283.[34] It

---

33. The federal plaintiff whose suit for injunctive relief was dismissed in *Kugler* had argued that "federal factfinding" on the admissibility in a state court of allegedly coerced grand jury testimony "would free the New Jersey courts from even the appearance of partiality . . . [and] thus assur[e] the integrity of the state judicial process without ultimately interfering with the State's right to enforce its own criminal laws . . . ." 421 U.S. at 129.

34. Implicit in the holding below is the suggestion that this Court is incapable of protecting its own appellate jurisdiction over state court judgments, and therefore is in need of aid from the federal district courts. But even if the Second Circuit were correct that, as a practical matter, the Texas courts could not or would not act on Texaco's constitutional claims with sufficient speed, Texaco would have an available remedy in this Court under 28 U.S.C. § 1257—*the very statute on which appellee bases its claim of*

is accordingly the exclusive province of this Court to decide whether, when and how to protect appellate jurisdiction over state court judgments.

As Justice Black explained for the Court in the *Atlantic Coast Line* case:

> [I]f, because of the Florida [trial court's] action, the [federal complainant] faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well. *Unlike the Federal District Court,* this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows the Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

398 U.S. at 296 (emphasis added).[35]

---

right—because Texaco would then have satisfied § 1257's requirement of exhausting remedies in "the highest court of a state in which a decision could be had." *See Brown v. Texas*, 443 U.S. 47, 50 (1979). And, under 28 U.S.C. § 1651(b), a Circuit Justice of this Court could grant a stay of the judgment pending appeal through the state system and review in this Court. *See, e.g., M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1342-43 (1983) (Brennan, J., in chambers). *See also Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1327-2º (1975) (Blackmun, J., in chambers). The relief granted in *Skokie* and *Nebraska Press* was identical to that sought by Texaco here: stay of enforcement of a state court judgment to enable a state litigant to pursue a meaningful appeal.

35. The district court injunction upheld in *Henry v. First Nat'l Bank*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), stayed enforcement of a non-final state court judgment (1) awarding damages and (2) enjoining racial protests. With respect to staying enforcement of the award of damages, the injunction was not issued to preserve appellate jurisdiction over the state judgment, but in aid of a prior, never-appealed and never-dissolved injunction issued by the district court itself, which concerned bank accounts containing the funds of the state court defendant. Thus the district court's injunction issued to preserve its own, pre-existing original jurisdiction. The state court judgment "expressly authorize[d] the state court

It creates no lacuna in the scheme crafted by Congress to hold that the lower federal courts are without authority to pass on those features of state appellate procedure that are alleged to impede meaningful review of state trial judgments. If such defects *are* challenged in the state's own judicial system, this Court sits to review the outcome and to issue appropriate stays; if they are *not* challenged there, the bypass of state remedies should be deemed fatal. Until the court below held to the contrary, this was the accepted view of the courts of appeals.[36]

In deputizing the district court in White Plains as a supervisory ombudsman over Texas appeals, the Second Circuit was not merely indifferent to the virtues of exhaustion: it ruled that Texaco's deliberate bypass of the Texas judiciary *affirmatively justified* Texaco's excursion to the federal courts. (A22). The court of appeals seized upon Texaco's deliberate refusal to exhaust the appellate remedies available in the pending Texas

---

plaintiffs to execute the damages award against the funds which [were] the subject of the earlier federal dispute," 595 F.2d at 307; therefore, the "only satisfactory resolution of this unseemly tension [lay] in delaying execution of the state court judgment until the prior federal injunction ha[d] been removed." *Id.*

To the extent that the federal injunction against enforcement of the state court judgment enjoining racial protests can be understood as signifying that the district court had power to preserve *appellate* jurisdiction over the state judgment, the decision's viability in the wake of the *Feldman* case is dubious. But this does *not* mean that this Court would never have had the opportunity to review and correct the state court judgment, as it ultimately did in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). For the NAACP exhausted its state appellate remedies before it filed its § 1983 action in a federal district court. 595 F.2d at 302. At that time, this Court would have had jurisdiction to consider an application for a stay of the state judgment under §§ 1257 and 1651. *See* n. 34 *supra*.

36. *See, e.g., Brown v. Chastain*, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (lower federal courts have no jurisdiction to make state appellate process more meaningful by directing state court to provide a transcript to an indigent mother in a custody battle); *Ganey v. Barefoot*, 749 F.2d 1124, 1127-28 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 3484 (1985) (similar facts) ("Neither the district court nor this court . . . is empowered to exercise that kind of appellate supervision of state court procedures").

litigation as rendering the *Rooker* and *Feldman* holdings wholly inapplicable to this case. Those decisions hold that only this Court has authority to review any judgment of a state court. That rule would concededly have barred Texaco from the district court if it had litigated its objections to the lien and bond rules in the Texas courts. But according to the Second Circuit's novel analysis, that barrier can be scaled by the simple expedient of failing to raise a question in a state proceeding—thereby precluding, by definition, the characterization of subsequent collateral federal district court consideration of that question as appellate "review." (A21). The court of appeals reasoned that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to file a federal suit rather than having to sue as a plaintiff in the state courts—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues that are unrelated "to the merits of [a state court] judgment" (A23, A41) and take them to the "concurrent" jurisdiction of a federal court (A21-22).

What had been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have all but doomed a stay application by Texaco to *this* Court pursuant to 28 U.S.C. § 1651 was viewed by the Second Circuit as providing Texaco a privileged entree to a federal *district* court under § 1983.[37] The ruling below thereby arrogates to the lower federal courts even more power to intercede in state appeals than this Court possesses under §§ 1257 and 1651, thus

---

37. The Second Circuit's inversion of traditional exhaustion reasoning is all the more bewildering in the wake of this Court's opinion in *Feldman*. There the Court dealt with the bypass issue and concluded that bypassing the state courts did *not* authorize otherwise impermissible federal court litigation:

> [T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does *not* mean that a United States district court should have jurisdiction over the claims. *By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.*

460 U.S. at 482-84 n.16 (emphasis added).

reconstituting the district courts as more potent and inviting fora in collateral proceedings than this Court on direct review.[38]

There is no authority whatever for the Second Circuit's proposition that *Rooker-Feldman* precludes only district court review of substantive claims concerning the merits of a state case and not consideration of the numerous procedural and structural issues posed by the processing of state litigation. Under 28 U.S.C. § 1257, this Court reviews "judgments or decrees," not claims or issues; the enforceability of the judgment obtained by Pennzoil in Texas is the very matter that the courts below purported to review, and the very matter that those courts stayed.[39] To say that a judgment is not "inextricably intertwined," *Feldman*, *supra*, 460 U.S. at 482-83 n.16 (quoted at A22-23), with its enforcement is not so much to draw a line as to fantasize one—and a wholly artificial one at

---

38. The holding below obviously makes federal forum shopping enticing indeed. It is also completely inconsistent with myriad decisions of this Court encouraging state court litigants to give state courts an initial opportunity to resolve all questions, *see*, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 549 (1981); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Huffman v. Pursue*, 420 U.S. at 603-09, and with the system devised by Congress for the orderly raising of federal questions in pending state court litigation, with review first in the state courts and ultimately in this Court.

39. Before the decision below (A22-23, A27), the federal courts of appeals had not supposed that the *Rooker-Feldman* doctrine may be limited to instances in which a federal court is literally asked to reverse the result of a state court adjudication—a limitation that would reduce the doctrine to one of mere issue preclusion. *Compare Feldman*, 460 U.S. at 488-90 (Stevens, J., dissenting). *See*, *e.g.*, *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986) (applying *Rooker-Feldman* to uphold dismissal of § 1983 complaint, where challenge to constitutionality of parts of Texas Family Code had *not* been raised in state divorce proceedings but could have been, even though federal plaintiff insisted that review of the *merits* of the state court judgment against it was being sought only in its state court appeal and that its federal complaint independently challenged several discrete provisions of Texas law); *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985) ("deliberate bypass of those procedures that envisioned (ultimately) a reviewable final state-court judgment, itself under *Feldman* not subject to federal district court review, should not . . . entitle the [plaintiff] to a review of his constitutional claims by a federal district court that would have been unavailable to him if he had pursued his claim to final state court judgment").

that. And to say that lower federal courts, while powerless to *review* state court judgments pending appeal, remain free to *enjoin enforcement* of those same judgments pending those same appeals, is to split fine philosophical hairs indeed. A judgment which the judicial system is not free even to consider enforcing or securing pending appeal is a judgment in name only.

By order of a federal district court, Pennzoil's judgment against Texaco has been reduced, throughout the appellate process in Texas and in this Court, to a piece of paper signifying only an empty declaration of abstract rights, except to the degree the federal court deems it reasonable to secure that judgment—a determination that itself cannot be made without evaluating the state court judgment.[40] Under *Rooker-Feldman*, the district court was therefore without jurisdiction to consider Texaco's request for such relief.

But even if *Rooker* and *Feldman* were read so narrowly that the district court could be said to have had subject matter jurisdiction in this case, the court below nevertheless erred in not directing the district court to impose an exhaustion requirement on Texaco's challenge to the Texas lien and bond provisions. *See* n.37 *supra*. For, by focusing on the narrow factual context of *Feldman*, the Second Circuit failed to probe beneath the surface for the principles of comity that provided the substructure for what this Court held. The core of this Court's comity jurisprudence is the proposition that

> [f]ew public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed busi-

---

40. The district court required security in the amount of $1 billion, based on its "review [of] the Texas trial and judgment on the merits (but without benefit of the trial record)" (A47). The Second Circuit deemed this procedure "clearly erroneous" (A47), but went on to survey for itself Texaco's state and federal challenges to the Texas judgment, declaring them "non-frivolous" (A42). The court of appeals then upheld the injunction and declined to remand to the district court for a proper "application of equitable principles" (A47-48), since the "facts relied upon by us in our foregoing analysis are undisputed" (A47).

> ness enterprises, or the final authority of a state court to interpret [state law].

Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (Frankfurter, J., for the Court) (quoted in *Moore v. Sims*, 442 U.S. at 428).

Since the Texas policy for accomodating the interests of judgment debtors and creditors pending appeal is certainly entitled to comity, and since the injunction upheld below undeniably interfered with that policy, the Second Circuit cannot escape comity principles by insisting that it has not reviewed, or interfered with proceedings on, the *merits* of the Texas judgment, but "only" enjoined any and all state proceedings to *enforce* that judgment or to *arrange security* for it pending appeal (A23, A35). It made no difference in *Juidice v. Vail* that the federal plaintiff sought to enjoin "only" an ancillary contempt proceeding, not the debt action itself nor even the judgment collection process. *See* 430 U.S. at 329-31. And in *Trainor v. Hernandez*, comity was held to bar federal interference even with an attachment proceeding that was merely incidental to the underlying fraud action. 431 U.S. at 446 n.9.[41] Thus, in insisting that its decision "does not displace any state court adjudication" (A23)—and therefore supposedly is not barred by *Rooker-Feldman*—the court below overlooked the fact that its decision *does* displace the Texas appellate courts and this Court as guardians of state appellate process and of this Court's appellate jurisdiction, and thereby undermines the very pillars of federalism that *Rooker-Feldman* sought to buttress.

---

41. Texaco's bald assertion, when urging summary affirmance, that *Younger* comity principles apply only to cases where "the federal plaintiff sought to stop an ongoing state proceeding in its tracks" (MTA 24), thus dissolves upon a quick review of the federal reporters. *See also, e.g., Kenner v. Morris* 600 F.2d 22 (6th Cir. 1979) (federal court may not enjoin state divorce court from following discriminatory alimony statute in awarding *pendente lite* support payments); *Neebuhr v. Bayer*, 502 F.Supp. 1216 (N.D. Ohio 1980) (may not reinstate plaintiff's state court tort action); *Gras v. Stevens*, 415 F.Supp. 1148 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.) (may not protect state court divorce plaintiff from discriminatory statute requiring him to pay defendant's state court counsel fees and costs); *Kahn v. Shainswit*, 414 F.Supp. 1064 (S.D.N.Y. 1976) (federal court may not force state courts to allow divorce defendant to present an adultery counterclaim).

The finality and exhaustion rules that limit this Court's consideration of applications to stay enforcement of state judgments—rules that would concededly have made Texaco's refusal to raise its federal challenge in the pending Texas proceedings a bar to interim relief in this Court on direct review—are, after all, more than mere guides to " 'good judicial administration.' " *North Dakota Pharmacy Bd. v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). They are mechanisms carefully designed to "avoid[ ] piecemeal review of state court decisions . . . and to leave at a minimum federal intrusion in state affairs." *Id.* Thus, even if the Second Circuit were correct that Texaco's deliberate bypass of the state courts circumvents the precise holding of *Feldman*, it is beyond cavil that Texaco's flanking maneuver has entailed both "piecemeal review" of state court proceedings and "federal intrusion in state affairs." Just as "all the evils at which *Younger* is directed . . . inhere in federal intervention prior to completion of state appellate proceedings, . . . as surely as . . . if such intervention occurred at or before trial," *Huffman v. Pursue*, 420 U.S. at 608, so all the evils at which *Feldman* is directed inhere in federal district court resolution of issues surrounding the enforcement and securing of a state court judgment, as surely as if the district court presumed to resolve the merits of the judgment itself.

In sum, the Second Circuit impermissibly treated a federal district court stay in aid of appellate jurisdiction as an exercise of original jurisdiction exempt from exhaustion requirements. The same mode of analysis would permit piecemeal shopping trips to federal fora on other procedural and structural issues that can readily be labeled "collateral" and made the basis of supposedly independent causes of action under § 1983. The judgment below thus invites state court litigants to carve issues out of pending cases and cart them to a federal district court in search of what they perceive to be a more favorable resolution. Despite admonitions from this Court that federal courts must be even " 'more reluctant . . . to intervene piecemeal to try collateral issues,' " *Kugler v. Helfant*, 421 U.S. at 130, the Second Circuit would allow litigants to assemble jurisdictional sandwiches to suit their tastes—a state slice here, a federal slice

there. This a la carte approach to federal-state judicial relations is utterly unpalatable and wholly alien to Our Federalism.

IV. THE JUDGMENT BELOW PREMATURELY SECOND-GUESSES A REASONABLE ACCOMMODATION OF ECONOMIC INTERESTS AND REDUCES THE STATE COURT'S JUDGMENT TO AN EMPTY DECLARATION OF ABSTRACT RIGHTS.

If this Court agrees that the courts below violated controlling principles of federalism for any of the three related but independent reasons advanced in Parts I, II, and III, *supra*, it need read no further, for the judgment below must then be reversed. But that judgment would be insupportable in any event. For, reaching a due process claim it should have left to the state courts, the Second Circuit incorrectly held that the Due Process Clause guarantees judgment debtor Texaco an affordable bond and entitles it to retain, in unencumbered form, the fruits of its tortious conduct pending appeal—as if the Texas trial court had never rendered a judgment at all. While conceding the legitimacy of protecting a judgment creditor's interests pending appeal (A35; MTA 11), the court below held (A44) and Texaco argues here (MTA 11) that it is irrational and thus unconstitutional for Texas to apply its security rules in this particular case.

The court below embraced Texaco's claim under § 1983 that conditioning a stay of execution on Texaco's posting of a $12 billion supersedeas bond "would at least amount to a deprivation of [Texaco's] property in violation of its right to due process" (A24), since such a bond could force Texaco into bankruptcy "by the time its appeals were decided" (A44), thereby rendering its appeal a "meaningless ritual." (A44).

It is conceded by all that due process does not require a state to provide an appeal, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930), but does prohibit states from imposing irrational or arbitrary requirements on the appellate opportunities they choose to make available. *Evitts v. Lucey*, 105 S.Ct. 830, 840 (1985). The State of Texas has not, of course, limited Texaco's appeal rights as such: Texaco's appeal was argued and submitted to

the Texas Court of Appeals on July 31, 1986, and prosecution of that appeal did not and does not now depend upon the posting of any security for the judgment, upon obtaining a stay of the judgment's execution, or upon a suspension of the Texas judgment lien provisions. What Texas *has* done, by adopting a general rule that ordinarily requires a judgment debtor like Texaco to post a bond in the full amount of the judgment as a condition of a stay, is presumptively to prefer (1) full protection for the winning party against the risk of partial or complete uncollectibility should the trial judgment ultimately be affirmed, over (2) full protection for the losing party against the risk of interim harm that may prove impossible to undo in its entirety should the trial judgment ultimately be reversed.

There is no basis for Texaco's assumption that this general rule would in fact be applied to require a full bond of Texaco, rather than fine-tuned in light of the facts at hand, since the injunction sought by Texaco and upheld by the court below has prevented the Texas courts from even addressing this question. But, even assuming that Texas courts would indeed decline to adjust the lien and bond rules to the degree Texaco deems warranted on these facts, there would be nothing in the least "irrational" in a decision to favor the security interests of Pennzoil as a victorious plaintiff over those of Texaco as a judgment debtor. Nor would it be the least bit "arbitrary" for Texas to deem the completion of the trial in this case a watershed, and to use that event as the basis for significantly readjusting the relative situations of the parties. For states are surely free to strike their own balance between the interests of judgment creditors and those of judgment debtors.

Under the Due Process Clause, state treatment of trial court judgments can run the gamut from denying any appeal at all, thereby making trial determinations final and completely dispositive, to granting the appellant a right of completely *de novo* review, thereby making challenged trial judgments mere triggers for virtual retrials of the facts and law. Within that broad spectrum, a state's policy on enforcement of or security for money judgments pending appeal may range anywhere from requiring immediate payment of damages, thereby making the appellant fight literally to get its money back, all the way to granting an automatic stay of execution, without any

security, upon the filing of a notice of appeal, thereby leaving the appellant entirely free to encumber or transfer assets and exposing the appellee to the unmitigated risk that its judgment will prove uncollectible even if upheld on appeal. To concede, as Texaco (MTA 10–11) and the Second Circuit (A43) do, that an appeal could constitutionally be dispensed with altogether, while insisting that, if an appeal is made available, the state is compelled to opt for a point nearer the end than the beginning of this wide spectrum, is nonsensical.[42]

As one might expect, the appellate rules of the states are scattered across the entire range of options. Thus, a handful of states in New England favor the debtor by providing for an unsecured, automatic stay of execution upon appeal.[43] Some 30 other states, including Texas, have decided that, once a trial is complete, the judgment creditor is presumptively entitled to a supersedeas bond equal to or greater than the judgment, as assurance that the creditor will be able to collect the award (and interest) if it is ultimately affirmed.[44] Nothing in the Due

42. It is not as if the state's refusal to grant Texaco, along with other judgment debtors, a stay of judgment in this case would independently violate some constitutional norm, or would make a constitutionally invidious distinction—as might be the case, for example, if stays of enforcement were available to everyone but the poor, or if access to a "meaningful" appeal were contingent upon wealth. *Cf. Douglas v. California*, 372 U.S. 353 (1963) (unconstitutional to refuse to pay for appellate counsel for indigents); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (refusal to waive cost of trial transcript for indigent). On the contrary, it is the special rule for billion-dollar multinational corporations and their billion-dollar torts, proposed by Texaco and adopted by the court below, that invidiously discriminates among judgment debtors. Nor does applying a rule favoring trial winners over judgment debtors even remotely resemble a decision to render an appeal ineffectual by allowing ineffective assistance of counsel to squander a criminal defendant's appeal, *see Evitts v. Lucey*, 105 S.Ct. 830 (1985); or a decision to allow a clerical snafu to obliterate forever a civil plaintiff's administrative cause of action, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Thus, nothing in this Court's prior cases supports the invalidation of the accommodation Texas has made between the interests of parties pending appeal.

43. Rhode Island, Connecticut, Maine, Massachusetts, New Hampshire, and Vermont. (Relevant citations are collected at JS 25 n.16).

44. Of these, the law in 11 states in addition to Texas requires the posting of a full bond: Alabama, Arkansas, Delaware, Iowa, Louisiana,

Process Clause empowers a federal court to arrogate to itself the authority to countermand that state policy choice simply because the federal tribunal might strike the balance differently or come to a different conclusion about the size of the threat to the judgment creditor's interests or the importance of minimizing that threat.

Until the ruling below, it was well established that a civil litigant, however sympathetic its case, has no due process right to be free from the execution of a judgment pending its appeal. In fact, this Court has expressly so held. In *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), a judgment debtor refused to file a bond protecting the judgment creditor pending appeal and, in order to "safeguard the collectibility" of the judgment, the state court dismissed the debtor's appeal. *Id.* at 41. This Court concluded that there had been no violation of the Due Process Clause. *Id.* at 44. *A fortiori* Texaco, with its right to appeal unrestricted by the Texas bond and lien provisions, has no right to be free from security requirements *pending* that appeal. There is simply "no obligation upon the State to provide for suspension of judgment" pending whatever appeal process it has made available. *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261, 263 (1916).

However a state chooses to strike the balance between judgment creditors and debtors, that substantive legislative

---

Michigan, Minnesota, Nebraska, New Mexico, Oklahoma, and South Dakota. Nineteen jurisdictions have laws presumptively requiring a full bond, but explicitly allowing the trial court some equitable discretion to reduce the size of the bond: Alaska, Arizona, District of Columbia, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and Wyoming. (The relevant citations are collected at JS 26 n.17). Such provisions cannot distinguish the rule in those 19 states from the rule at issue here. For the nub of Texaco's complaint here must be that the *the particular bond demanded in this case* would unjustifiably work the same injury pending appeal as immediate execution of Pennzoil's judgment. Were a $12 billion bond to be set in the discretion of a Texas judge after a full hearing, Texaco's due process theories would still allow it to claim a violation of its constitutional rights on the ground that, given Texaco's net worth, the lack of a full bond poses no real risk to Pennzoil and the requirement of such a bond therefore "eviscerate[s]" Texaco's "right to appeal . . . without advancing the state interest at issue." (MTA 11).

choice ought to be respected by federal courts—subject, at the most, to invalidation if it fails the test of minimum rationality. "At least since the demise of the concept of 'substantive due process' in the area of economic regulation, this Court has recognized that '[l]egislative bodies have broad . . . [discretion] to subordinate the . . . rights" of some economic actors "to the conflicting rights" of others. *New Motor Vehicle Bd. v. Fox*, 439 U.S. 96, 107 (1978); *id.* at 112 (Marshall, J., concurring). Even in the heyday of searching review of economic legislation, not a single Justice of this Court saw any constitutional infirmity in a rule requiring a supersedeas bond equal to 110% of the judgment. *Louisville & Nashville Railroad Co. v. Stewart, supra*, 241 U.S. at 263. And, "[o]nce having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions" of the scheme adversely affect a given party, *New Motor, supra*, 439 U.S. at 108. *See also Weinberger v. Salfi*, 422 U.S. 749, 772-74, 776-77, 782-83 (1975); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970).

Lurking behind the Second Circuit's ruling is the premise that, because of the circumstances of this case, Texaco is entitled as a matter of federal law to avoid, pending appeal, the consequences of its trial loss—in effect, to proceed with business as usual, almost as though the Texas trial court had never entered a judgment against Texaco. The court below essentially held that, on this record, the Texas judicial system has no claim at all in the matter until all appeals within and from that system have been exhausted. To state that contention is to refute it: the most elementary axioms of respect for state judicial proceedings prevent federal courts from *ever* reducing state court judgments, throughout the pendency of the state appellate process, to empty declarations of abstract rights—like so many "bequest[s] in a pauper's will," *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).[45]

---

45. As Texaco itself concedes—and as this Court has held—"a state court has 'inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution' " when, *during the pendency of an appeal*, " 'the effectiveness of a money judgment is jeopardized by the judgment debtor.' " (MTA12 n.22) (quoting *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954)).

The court below seemed to recognize that the legitimacy of such intervention is extraordinarily dubious, for it went to great lengths to insist that injunctive relief was necessary here because the Texas courts were supposedly unable and unwilling to grant Texaco interim relief from the Pennzoil judgment. (A35, A50-51). Yet for all we know, the courts of Texas might well have suspended the trial judgment on these facts without requiring a full bond—*if Texaco had only asked. See* Part II., *supra*.

We return, therefore, to the very center of this case: the proper place for Texaco to have raised its claims against the rigid enforcement it feared was in the Texas courts and, if its claims were rebuffed there, in this Court on direct review. Texaco's deliberate bypass of state avenues of relief that might have promptly mooted the entirely hypothetical due process argument it presses upon this Court does not entitle it to a decision on the merits of that argument.

CONCLUSION

For the several independent reasons presented above, the judgment below must be reversed.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

September 5, 1986

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

SIMON H. RIFKIND
ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
KENNETH S. GELLER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

No. 85-1798

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEE

THOMAS D. BARR
DAVID BOIES*
MAX R. SHULMAN
FRANCIS P. BARRON
ROBERT B. SILVER
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN*
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
J. CLARK KELSO
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

*Counsel of Record

November 4, 1986

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.	vii
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	ix
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE SECOND CIRCUIT CORRECTLY HELD THAT APPLICATION OF THE LIEN AND BOND PROVISIONS WOULD VIOLATE DUE PROCESS	11
II. THE SECOND CIRCUIT CORRECTLY HELD THAT PENNZOIL WAS A STATE ACTOR	17
A. The Second Circuit's Decision Is Well Within *Lugar*	18
B. The Second Circuit's Decision Does Not Affect The Anti-Injunction Act	21
C. The Second Circuit's Decision Is Well Within The Fairness Policies Underlying The State Action Doctrine	22
III. THE SECOND CIRCUIT CORRECTLY HELD THAT *YOUNGER* ABSTENTION IS NOT WARRANTED	24
A. The Narrow Relief Below Does Not Enjoin An Ongoing State Judicial Proceeding Affecting A "Vital" Or "Important" State Interest	24
B. Texaco Lacked An Adequate And Timely Remedy In The Local Forum	32
1. Tex. R. Civ. P. 365(b)	39
2. "Vested" Power	40
3. Tex. Civ. Prac. & Rem. Code § 65.013	42
4. Inherent Equitable Power	43
IV. THE SECOND CIRCUIT CORRECTLY HELD THAT THE FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION OVER TEXACO'S DUE PROCESS CLAIM	44
CONCLUSION	49

TABLE OF AUTHORITIES

Page

CASES:

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) ... 44, 47

Barefoot v. Estelle, 463 U.S. 880 (1983) 48

Boddie v. Connecticut, 401 U.S. 371 (1971) 15

Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) 46

Burgher v. Chrisman, 604 S.W.2d 536 (Tex. Civ. App.—Dallas 1980, no writ) 39

City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) 15

Comal County Rural High School District No. 705 v. Nelson, 158 Tex. 564, 314 S.W.2d 956 (1958) 36

Commissioners Court of Harris County v. Peoples National Utility Co., 538 S.W.2d 228 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) 36

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 38

Dennis v. Sparks, 449 U.S. 24 (1980) 19

Diamond v. Charles, 106 S. Ct. 1697 (1986) 10, 26

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 44, 45, 46, 47

Donald v. Carr, 407 S.W.2d 288 (Tex. Civ. App.—Dallas 1966, no writ) 38

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) .. 11

Estate of Ross, 672 S.W.2d 315 (Tex. App.—Eastland 1984, writ ref'd n.r.e.), *cert. denied*, 105 S. Ct. 1844 (1985) 36

	Page
Evitts v. Lucey, 469 U.S. 387 (1985)	12, 15
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	15
Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 3484 (1985)	46
Gibson v. Berryhill, 411 U.S. 564 (1973)	27, 34
Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)	46
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	38
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	24, 33
Helton v. Kimbell, 621 S.W.2d 675 (Tex. App.—Fort Worth 1981, no writ)	36
Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)	16
Hernandez v. Finley, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)	35
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	24, 25, 28, 29, 34
Johnson v. Hughes, 663 S.W.2d 11 (Tex. App.—Houston [1st Dist.] 1983, no writ)	38
Juidice v. Vail, 430 U.S. 327 (1977)	26, 29, 30, 33
Kennesaw Life & Accident Insurance Co. v. Streetman, 644 S.W.2d 915 (Tex. App. —Austin 1983, writ ref'd n.r.e.)	42
Kugler v. Helfant, 421 U.S. 117 (1975)	31
Lindsey v. Normet, 405 U.S. 56 (1972)	15
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	12
Louisville & Nashville R.R. Co. v. Stewart, 241 U.S. 261 (1916)	14
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	17, 18, 19, 20, 21, 22, 23

	Page
Man-Gas Transmission Co. v. Osborne Oil Co., 693 S.W.2d 576 (Tex. App.—San Antonio 1985, no writ)	40
Marino v. Ragen, 332 U.S. 561 (1947)	44
Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)	45
Mathews v. Eldridge, 424 U.S. 319 (1976)	14
Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982)	26, 33
Migra v. Warren City School District, 465 U.S. 75 (1984)	45
Mitchum v. Foster, 407 U.S. 225 (1972)	8, 47
Monroe v. Pape, 365 U.S. 167 (1961)	20, 42
Moore v. Sims, 442 U.S. 415 (1979)	26, 28, 29, 30, 33, 35, 43
Mudd v. Mudd, 665 S.W.2d 128 (Tex. App.—San Antonio 1983, no writ)	40
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	16
National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954)	14
Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (1975)	48
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978)	15
Oaks v. District Court of the State of Rhode Island, 631 F. Supp. 538 (D.R.I. 1986)	13
Ohio Civil Rights Commission v. Dayton Christian Schools, 106 S. Ct. 2718 (1986)	26, 43
O'Shea v. Littleton, 414 U.S. 488 (1974)	31
Pace v. McEwen, 574 S.W.2d 792 (Tex. Civ. App. — El Paso 1978, writ ref'd n.r.e.)	41
Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. — San Antonio 1980, no writ)	41

	Page
Pace v. McEwen, 617 S.W.2d 816 (Tex. Civ. App. — Houston [14th Dist.] 1981, no writ)..	41
Parham v. J.R., 442 U.S. 584 (1979).....	15
Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)	42
Renger v. Jeffrey, 143 Tex. 73, 182 S.W.2d 701 (1944)	18
Rocha v. Ahmad, 676 S.W.2d 149 (Tex. App.—San Antonio 1984, writ dism'd)	36
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)	44, 45, 46, 47
Santa Rosa Medical Center v. Robinson, 560 S.W.2d 751 (Tex. Civ. App.—San Antonio 1977, no writ).....	36
Thomas v. Kadish, 748 F.2d 276 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985).....	46
Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946)	35
Trainor v. Hernandez, 431 U.S. 434 (1977).....	25, 26, 29, 30, 31, 34, 43
Younger v. Harris, 401 U.S. 37 (1971).....	9, 10, 22, 24, 31
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Fourteenth Amendment	45
STATUTES AND RULES:	
United States	
28 U.S.C. § 1257 (1982).....	31, 39, 44
28 U.S.C. § 1341 (1982).....	35
28 U.S.C. § 1343(a)(3) (1982).....	47
28 U.S.C. § 2283 (1982).....	21
28 U.S.C. § 2403(b) (1982).....	10
42 U.S.C. § 1983 (1982).....	21, 27, 28, 31, 46, 47
Fed. R. Civ. P. 62	25, 37

	Page
Texas	
Tex. Const. art. XVI, § 50 (Vernon Supp. 1986)	41
Tex. Rev. Civ. Stat. Ann. art. 3827a (1979)	41
Tex. Civ. Prac. & Rem. Code § 37.006(b) (Vernon 1986)	36
Tex. Civ. Prac. & Rem. Code § 65.013 (Vernon 1986)	42
Tex. Prop. Code Ann. § 52.001 (Vernon 1984)	3, 19
Tex. R. Civ. P. 22	36, 42
Tex. R. Civ. P. 324(b)	6, 37
Tex. R. Civ. P. 329	6
Tex. R. Civ. P. 329b	6, 36
Tex. R. Civ. P. 329b(c)	37
Tex. R. Civ. P. 329b(e)	36
Tex. R. Civ. P. 364	19, 43
Tex. R. Civ. P. 364(a)	42
Tex. R. Civ. P. 364(b)	3, 38, 39, 41, 42
Tex. R. Civ. P. 364(c)	39
Tex. R. Civ. P. 364(d)	39
Tex. R. Civ. P. 364(e)	39
Tex. R. Civ. P. 364(f)	39, 40
Tex. R. Civ. P. 364(h)	39
Tex. R. Civ. P. 365(a)	39
Tex. R. Civ. P. 365(b)	39, 40
Tex. R. Civ. P. 389a	40
Tex. R. Civ. P. 627	3
Tex. R. Civ. P. 682	36
OTHER AUTHORITIES:	
New York Times, Feb. 21, 1986, at D1, col. 6	32
Wall Street Journal, Mar. 25, 1986, at 7, col. 1	32
Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986)	48

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
S. A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company

Texaco Chemical Company
Canadian Reserve Oil and Gas Ltd.
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Title 28, § 1343(a)(3) of the United States Code provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 28, § 1341 of the United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Texas Civil Practice and Remedies Code § 37.006(b) provides:

> In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

Texas Rule of Civil Procedure 22 provides:

> **Commenced by Petition.** A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Texas Rule of Civil Procedure 324(b) provides:

> **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:
>
> (1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
>
> (2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

Texas Rule of Civil Procedure 365 provides:

(a) Sufficiency. The sufficiency of a cost or supersedeas bond or deposit or of any other bond or deposit under Rule 364 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed in and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

(b) Excessiveness. In like manner, the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive.

Texas Rule of Civil Procedure 627 provides:

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

Texas Rule of Civil Procedure 682 provides:

> **Sworn Petition.** No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.

Texas Rule of Civil Procedure 329b is reprinted as Appendix A.

Texas Rule of Civil Procedure 364 is reprinted as Appendix B.

Other constitutional provisions, statutes and rules involved may be found in appellant's brief pursuant to Rule 34.1(f) of the Rules of this Court.

STATEMENT OF THE CASE

In its papers before the federal district court, Pennzoil protested that it "seeks only to preserve the legitimate interests of both parties" and that it "has every reason to promote the financial viability and well-being of Texaco".[1] In this Court, Pennzoil claims to be the champion of comity and "our federalism". (PB 12)[2]

Pennzoil, in fact, has had neither Texaco's interests nor comity interests at heart. It has had one interest and one interest only: to use the threat of impossible and unnecessary local security requirements to force Texaco into a settlement unrelated to the merits of the *Pennzoil v. Texaco* state court lawsuit, thereby eliminating the possibility of there ever being corrective appellate review of the Texas trial court judgment in that suit.

Pennzoil knows—indeed, the uncontroverted findings of fact below make clear:

- that application of the Texas security provisions is not necessary to protect the efficacy or collectability of Pennzoil's state court judgment;

- that invocation of those provisions—by causing the immediate evaporation of even short-term sources of financing for Texaco while at the same time greatly expanding Texaco's short-term needs for cash—would quickly drive Texaco into bankruptcy or liquidation;

- that, as a result, Texaco would be deprived of its state-guaranteed right to a meaningful appeal from the state trial court judgment—an appeal raising substantial federal and state issues;

- that the Texas security scheme itself—by deliberately removing any role for the state judiciary—provided no

---

[1] Memorandum in Opposition to Texaco's Motion for a Preliminary Injunction and in Support of Pennzoil's Cross-Motion to Dissolve the TRO and Dismiss the Amended Complaint, Dec. 20, 1985, at 4.

[2] Citations in the form "PB ___" refer to pages in the Brief for Appellant in this Court. Citations in the form "A ___" refer to pages in the Appendices attached to Pennzoil's Jurisdictional Statement. Citations in the form "CCA ___" refer to pages in the Joint Appendix before the Second Circuit, a copy of which is being separately provided to this Court.

procedural avenue for Texaco to make a challenge to the security rules, and that any procedural route for making a constitutional challenge in the state courts would (at best) have had to be used in novel, unintended and wholly uncertain ways;

• that before the Texas trial court, Pennzoil made every effort—by vigorously opposing any flexible uses of procedures or emergency trial court conferences—to insure that state relief for Texaco would be either impossible or too late;

• that the result of Pennzoil's conduct was to create unrelenting uncertainty about Texaco's future, to exacerbate Texaco's financial crisis and to maximize settlement pressure on Texaco; and

• that when Texaco finally moved for emergency federal relief—with all state avenues impeded and time running out—Texaco was on the edge of destruction.

In short, far from giving state courts an opportunity to rule on Texaco's federal claim, before the Texas court Pennzoil did just the opposite. Now, in this Court—with values supportive of federal abstention at their lowest and values supportive of federal equity relief at their highest—Pennzoil contends that access to emergency federal relief should nonetheless have been barred. No decision, precedent or principle enunciated by this Court would justify such a dramatic contraction of federal jurisdiction.

The result below was supported by detailed findings of fact based on *uncontroverted* evidence. Pennzoil does not (because it cannot) point to a single finding that is inconsistent with that evidence. Nor does Pennzoil (because it cannot) attempt to reconcile those findings with its arguments to this Court. Pennzoil either ignores the findings or makes arguments that affirmatively require their reversal. Any doubt about what Pennzoil has been up to is quickly dispelled by a brief chronology of events since entry of the state court judgment. That chronology—based upon the uncontroverted record below—shows why Texaco was compelled to seek emergency federal relief and why that narrow relief was properly granted.

(a) On December 10, 1985, a trial court in Texas entered a money judgment against Texaco (the "Judgment") in the unprecedented amount of $11.12 billion (A6)—over 40 times larger than the largest private civil judgment ever upheld in any prior case of any kind.

(b) Under Tex. R. Civ. P. 364(b) and 627, a money judgment is enforceable by execution 30 days after entry (or, if a new trial motion is made, 30 days after its denial), unless the judgment debtor posts a supersedeas bond in "at least the amount of the judgment, interest and costs". (A8 & n.4, A86)[3] A bond in this minimum amount is mandated by law; Texas courts have no discretion to reduce it or stay execution without it. (A9-10, A30-31, A103)[4]

(c) Even if execution is suspended by posting the required supersedeas bond, Tex. Prop. Code Ann. §§ 52.001 *et seq.* still permit a judgment creditor to place liens upon a judgment debtor's real property in Texas immediately upon entry of judgment. (A86-87; *see also* A25-26, A8-9) There is no authority under Texas law for staying attachment of such judgment liens.[5]

(d) Under the bond provisions, to obtain a stay of execution of the Judgment pending appeal, Texaco would have had to post a bond in excess of $12 billion. (A8) No company could have posted such a bond, since "the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances". (A9)[6]

---

[3] Effective September 1, 1986, all Texas rules of civil and criminal procedure affecting appeals were recodified as the Rules of Appellate Procedure. Citations herein are to the Rules of Civil Procedure in effect as of December 1985.

[4] If a supersedeas bond is not posted, a writ of execution is obtained by *ex parte* application to the court clerk, the writ is presented by the judgment creditor to the county sheriff, and the sheriff executes it. (A25-26)

[5] Judgment liens are obtained by *ex parte* application to the court clerk, who furnishes an abstract of judgment which the judgment creditor delivers to county recorders in counties where the judgment debtor's real property is located. The county recorders then index and file the abstract, thereby perfecting the lien. (A25-26, A84-85) Pennzoil suggests that judgment liens are permitted only if a supersedeas bond is not posted. (PB 2) That is not correct. A judgment creditor can place liens upon a judgment debtor's property regardless of whether a supersedeas bond has been posted and even if security for the judgment is not needed. (A86-87)

[6] Similarly, although Texaco had a liquidation value in excess of $22 billion (A39), it could not possibly have posted $12 billion in cash or cash

(e) If no supersedeas bond was posted, Pennzoil could have executed the Judgment, thereby effectively dismantling Texaco. Even with a supersedeas bond, the attachment of liens on Texaco's real property in Texas, valued at $5 billion, would "seal the company's fate", forcing Texaco into bankruptcy or liquidation. (A39-40, A98)[7] As a result, Texaco's ability to pursue an effective state court appeal from the Judgment—an appeal guaranteed by the Texas Constitution and raising non-frivolous federal and state issues (A42)—would have been destroyed. The damage to Texaco would have been "immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits". (A44)

(f) Application of the lien and bond provisions would also have adversely affected the national economy and national security.[8] The extent of the public harm threatened by premature enforcement of the Judgment was attested by the fact that in the court below "some 58 interested parties including 12 states . . . filed amicus briefs or other papers urging that enforcement be enjoined". (A40)

(g) Upon the consent of both parties, Paragraph 7 was inserted into the Judgment, barring Pennzoil from enforcing the Judgment for the limited time the trial court retained jurisdiction, so long as Texaco satisfied certain conditions.[9]

---

equivalents and "still retain sufficient liquid assets to operate its business" (A9; *see also* A39-40); nor, because of the terms of its unsubordinated indebtedness, could it have possibly borrowed $12 billion by mortgaging or pledging its assets (A9).

[7] The attachment of liens would have been particularly devastating to Texaco, because it would have triggered default and cross default provisions in approximately $1.74 billion of unsecured long-term debt, thereby rendering Texaco "unable to obtain additional credit while requiring it to raise $1.74 billion (on top of all its other cash needs) to pay the accelerated indebtedness". (A98)

[8] If Texaco had been forced into liquidation or bankruptcy, a large percentage of Texaco's 55,000 employees world-wide, with an annual payroll of $1.6 billion, would have lost their jobs; and approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would have suffered heavy losses. (A40) In addition, "the inability of Texaco to function in a normal manner" could "adversely affect this country's balance of payments", make "this country's oil supply less secure", impair the "ability to supply military forces" around the world, and "prompt" other foreign actions "harmful to the national security or foreign policy of the United States". (A112-13)

[9] If Texaco took the full 30 days from entry of judgment allowed by Texas law to file a new trial motion, the expiration of the trial court's

Pennzoil refused to agree to further relief and took the position (correct under Texas law) that the court was powerless to give any relief without Pennzoil's consent. (A7, A8, A103)

(h) Despite Paragraph 7, in the week after entry of the Judgment, Texaco's financial condition rapidly deteriorated, driving the company to the brink of bankruptcy. (A10, A90-98)[10] Texaco's bonds were downgraded by Moody's from investment grade to non-investment grade; Texaco was forced to withdraw from the commercial paper market; banks with which it did business advised that they would no longer lend the company money on unsecured terms; potential joint venturers with Texaco cancelled negotiations; suppliers refused to do business with the company on regular and customary terms; companies refused to negotiate routine deals for the purchase of Texaco assets; and Texaco's ability to obtain crude oil—"the lifeblood of Texaco's operations"(A95)—was jeopardized. At the very time that Texaco's access even to short-term financing was being cut off, its short-term need for cash was substantially increased. (A40, A95; *see* A10)

(i) Because of the severity of Texaco's financial crisis, on December 13, 1985, Texaco co-counsel wrote to the Texas

---

jurisdiction (and, thus, of Paragraph 7's terms) could have occurred at the earliest on February 8, 1986, and at the latest on March 25, 1986. (A89)

[10] For at least two reasons, Paragraph 7 failed to stop Texaco's financial deterioration. *First*, lenders and suppliers knew that Paragraph 7 would expire in an indefinite, but under any circumstances short, period of time, after which Pennzoil could attach or execute on Texaco's property. (A10, A88-90) Because most credit and supply transactions could not be completed within the time period covered by Paragraph 7, lenders refused to advance even short-term financing and suppliers reversed long-standing trade creditor relationships by insisting upon advance payment in cash (or by letter of credit) as a condition of doing business. (A93-95) *Second*, there was reluctance to deal with Texaco because of uncertainty over whether particular transactions were permitted under Paragraph 7, which, *inter alia*, prohibited Texaco from engaging in transactions other than "in the routine and ordinary course of business". (A90, A97-98)

Pennzoil itself aggravated the situation by publicly threatening to undo whatever limited protection Paragraph 7 afforded. Specifically, Pennzoil's chairman warned that the company was " 'going to put pressure' " on the Texas trial court to permit attachment of liens unless Pennzoil was satisfied with Texaco's settlement proposals, and a Pennzoil director and "legal strategist" charged Texaco with violating the "standstill" provisions of Paragraph 7 "by providing letters of credit from its bankers in purchasing products and services"—a clear threat to have the "standstill" lifted. (A105; *see* A46)

trial court urgently requesting a conference. (A101) The trial court immediately responded, suggesting three alternative dates "subject to agreement of all counsel". (A102) The next day, however, Pennzoil counsel informed Texaco that Pennzoil would not agree to a conference on any of the three dates suggested by the trial court—"or at any other time". (A102)

(j) In response to Pennzoil's refusal, Texaco immediately renewed its request to the Texas trial court. (A102) Two days later—on December 16, 1985—Pennzoil counsel wrote to the trial court, opposing a conference and urging that "any suggested hearing as requested by Texaco" be "considered a motion under Rule 329b" and "be held in an orderly manner when Texaco is ready to proceed on its motion for a new trial". (CCA00849-50)[11]

(k) On December 17, 1985, Texaco co-counsel received a letter from the Texas trial court stating that co-counsel was not an " 'attorney of record' " for Texaco; that his prior requests for a conference had been improper " 'ex parte communication[s]' " on which the trial court would not act; and that the court would insist upon "compliance with the

[11] Pennzoil surely appreciated that requiring strict compliance with local procedural rules and precluding Texaco from a conference with the Texas trial court (where a further agreement between the parties might have informally been worked out) made Texaco's ability to secure relief from application of the lien and bond provisions in the pending proceeding at best gravely uncertain and at worst impossible. *First*, the security scheme itself provided for no process whatever by which Texaco could have asked for judicial review of the security requirements. *See infra* at 25.

Second, a route for making a constitutional challenge in the pending proceeding was highly doubtful, if not completely unavailable. That is because: (a) there is no precedent in Texas which would have allowed such a challenge, upon entry of the Judgment, to be made by motion or other pleading in the pending proceeding, as opposed to by an original injunction action commenced by filing a verified petition; and (b) it is a prerequisite to a constitutional challenge that the Texas Attorney General be given notice and an opportunity to be heard, and there was no way to know beforehand whether the Attorney General would request intervention and, if so, whether the trial court—in view of its ostensible lack of power, upon entry of the Judgment, to permit intervention—would therefore preclude Texaco's challenge. *See infra* at n.72.

Third, if, despite the above, Texaco had opted for the novel and uncertain route of attempting to raise a constitutional challenge to collateral security provisions by motion for new trial, it still would have confronted an intolerable choice: either (a) making the new trial motion precipitously,

(Footnote Continued)

'Texas Rules of Court' as to the types of motions that can *now* be filed, together with adherence to the rules as to *notices* and *requests for hearings* thereon". (CCA00852; emphasis added) The first two of those statements were wrong—and, that very day, Texaco so advised the trial court;[12] the last indicated that the trial court had adopted the position urged by Pennzoil on December 16. It was only then, with "time . . . of the essence" (A35), that Texaco moved for emergency injunctive relief in the federal court.

(1) Against the devastation which would have been caused to Texaco without such relief, application of the lien and bond provisions was wholly unnecessary to protect any legitimate Pennzoil interest. As the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full". (A45-46; *see also* A47-48)[13]

---

despite its considerable substantive complexity and importance (normally, a litigant has 30 days to make a new trial motion and most error not identified therein is waived (Tex. R. Civ. P. 324(b), 329b)); or (b) spending the requisite time preparing the motion, which would have delayed judicial action for days, if not weeks—"precious time" (A37) that Texaco did not have. *See infra* at n.72.

It is instructive in retrospect, moreover, that when Texaco did make its new trial motion, the trial court (after unsuccessfully attempting to coerce Texaco to waive a challenge to its qualifications) simply refused to hold a hearing or make any ruling, allowing the motion to be denied by operation of law 75 days after entry of the Judgment. Thus, whatever course Texaco chose, it would in the event have led up a blind alley.

[12] The particular Texaco co-counsel in question *was* an attorney of record for Texaco, had filed a formal notice of appearance, had participated in earlier proceedings before the Texas trial court and had even personally signed the Judgment at the trial court's request. Further, the Texaco letters to the trial court were not *ex parte* communications, but had been contemporaneously delivered to all counsel—and expressly so indicated. Finally, in Texaco counsel's experience, "under Texas practice" requests for conferences were "often made in letter form with copies to all counsel". (CCA00854-55) The trial court *never* responded to Texaco's letter and *never* scheduled a conference as requested by Texaco. (A103; *see* A10)

[13] Texaco's appraised net worth as of December 31, 1984, was in excess of $22.6 billion; Pennzoil itself estimated that Texaco had assets far greater than necessary to satisfy the Judgment; Pennzoil's chairman publicly conceded that " 'he did not doubt Texaco's ability to pay the damages' "; and there was "no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the ordinary course of business or that it would transfer any of its assets to defraud Pennzoil". (A46-47)

(Footnote Continued)

(m) Given Pennzoil's conceded lack of need for security and the non-frivolous questions raised by Texaco's state court appeal, the Second Circuit was moved to observe that Pennzoil's "pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal". (A46)

SUMMARY OF ARGUMENT

Section 1983 has a limited—but necessary—function as a safety valve "to prevent great, immediate and irreparable loss of a person's constitutional rights".[14] This case illustrates that function. The federal injunction affirmed by the Second Circuit was an emergency measure to prevent extraordinary irreparable injury—the bankruptcy or liquidation of one of the world's major corporations—that would have resulted from the unconstitutional application of Texas' security provisions, where no procedural route in the Texas courts could plausibly have provided the timely relief Texaco desperately needed. Far from creating "a capacious zone within which comity is simply inapplicable" (PB 9) or sanctioning a "deliberate bypass" of local procedures (PB 10), the decision below falls well within doctrines previously enunciated by this Court. Pennzoil's contrary portrayal is wrong on every point.

In Reply to Texaco's Motion to Affirm, June 10, 1986, Pennzoil complained that the basis of the lower court's finding of lack of need was "uniformly citations to hearsay newspaper reports of statements attributed to Pennzoil officials or attorneys". (Reply Brief at 4 n.6) In the first place, the lower court's findings were based, not on hearsay, but on affidavits and admissions. (*See* A47; CCA00873-75) Pennzoil never contested the accuracy of that evidence during the district court proceedings, never challenged the adequacy of the $1 billion bond set by the district court and never sought to avail itself of the procedures explicitly established by that court (and approved by the Second Circuit) to increase security if circumstances change (*see* A53-55). Moreover, one month *after* probable jurisdiction had been noted in this case, Pennzoil reiterated its lack of need for interim security—this time in a formal pleading filed with the Texas Court of Appeals which represented that "the judgment can be satisfied through transfer of assets in a manner that would not affect Texaco's economic viability, given its vast resources". (Reply of Appellee Pennzoil Company to Various Amicus Briefs, July 24, 1986, at 3)

[14] *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

First, Texaco did not seek—and the court below did not sanction—a constitutional requirement of "an affordable means of staying execution" of a judgment pending appeal. (PB 6) The Second Circuit ruled that where interim security provisions are impossible for a judgment debtor to satisfy and are unnecessary to protect any legitimate interest of a judgment creditor, and where they thereby totally subvert meaningful access to appellate review, then application of those security provisions lacks any rational basis and violates the Due Process Clause. Pennzoil cites no case to the contrary.[15]

Second, Texaco did not seek—and the court below did not sanction—a rule which, for Section 1983 purposes, has the effect of "transforming *every* state-court judgment winner who seeks enforcement into 'the state' ". (PB 13; emphasis in original) State action is involved here not because Pennzoil "won" in the Texas trial court, but because Texas, by its security scheme, has ceded to Pennzoil unsupervised power over ministerial state officials which can be used, prior to final adjudication of its claims, to aid in the seizure and sale of Texaco's property—property that remains very much in dispute.[16]

Third, Texaco did not seek—and the court below did not sanction—interference with any on-going state court proceeding, and certainly not interference with a state court proceeding in which Texas has a "vital" or "important" interest sufficient to justify abstention under *Younger v. Harris*, 401 U.S. 37 (1971). By deliberately eliminating judicial supervision over the lien

[15] The Second Circuit's "as applied" holding does not affect the *facial* validity of the Texas security scheme; does not even remotely suggest that the Fourteenth Amendment categorically prohibits mandatory full-bonding statutes; and does not require Texas "'to provide for a prior individualized hearing each and every time the provisions' of [its] scheme adversely affect a given party" (PB 49). Nor, where a state has enacted a non-discretionary full-bonding scheme, does the Second Circuit's ruling authorize the federal courts to make the type of wide-ranging inquiry that can be made under discretionary bonding rules.

[16] Nothing done below would convert a litigant into a "state actor" merely because of his "invocation of state judicial proceedings" (PB 16); indeed, the Second Circuit's state action holding depends importantly upon the fact that *no* judicial process relating to security can be invoked in Texas. Nor would anything done below make a "state actor" out of a litigant who invokes state enforcement mechanisms *after* a judgment becomes final, upon exhaustion of all appeals, when the property at issue is no longer in dispute.

and bond provisions, the State of Texas itself guaranteed that there could be no state judicial process here of the type which has been a prerequisite for abstention in every *Younger* case.[17] As Pennzoil would have it, the comity that *Younger* accords independent state enforcement and adjudicative officials should be accorded here to a purely private litigant controlling public power for purely private purposes. No *Younger* case supports such a result.

Fourth, Texaco did not seek—and the court below did not sanction—a result which constitutes or requires review of Pennzoil's Judgment or which ousts the Texas appellate courts from their unfettered ability to rule on the merits of the *Pennzoil v. Texaco* lawsuit.[18] Texaco's due process challenge to the lien and bond provisions turns on considerations wholly apart from the merits of that lawsuit. Nor could Texaco's challenge place the efficacy or collectability of the Judgment in doubt, dependent as the challenge is upon Pennzoil's conceded lack of need for security.

Fifth, the present action was filed in response to the threat of immediate and irreparable harm to Texaco (and to the public interest) which could not have been averted by "adequate and timely" state court remedies. (A37) Even at this late date, Pennzoil itself is unable to identify any procedural avenue available to Texaco in the Texas state courts, free from grave uncertainty regarding its utility for raising and having timely resolved the type of constitutional claim that Texaco brought below. Rather, Pennzoil contends that Texaco was required to bear the risk of uncertainty, where all identifiable state court routes would have had to be used in novel and unintended ways, where Pennzoil itself was vigorously opposing anything

---

[17] The only judicial proceeding that is pending in Texas—the proceeding on the merits of Pennzoil's claim against Texaco—is a purely private dispute involving purely private parties, and the State of Texas expressly represented in the court below that it has "no interest in the outcome" of that dispute. (Brief of the State of Texas, Intervenor-Appellant, Jan. 23, 1986 ("Tex. Br."), at 2) Moreover, Texas, whose security provisions are at issue, intervened as a party in the district court pursuant to 28 U.S.C. § 2403(b), and separately appealed to the Second Circuit (A4 n.1), but is neither an appellant nor a participant in this Court. *See Diamond v. Charles*, 106 S. Ct. 1697, 1702-04 (1986).

[18] Texaco's state court appeal from the Judgment is moving forward right now. The appeal was argued and submitted to the Texas Court of Appeals on July 31, 1986, and is currently *sub judice*.

but strict adherence to the letter of the rules, and where a single incorrect choice by Texaco would have had disastrous consequences (both to Texaco and to the nation as a whole). There is no doctrine—and Pennzoil identifies none—which, in the face of such exigent circumstances, would support the wholesale abdication of federal jurisdiction that Pennzoil now urges. Nor should there be.

ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT APPLICATION OF THE LIEN AND BOND PROVISIONS WOULD VIOLATE DUE PROCESS.

According to Pennzoil, the Second Circuit ruled that "the Due Process Clause entitles a civil judgment debtor . . . to an affordable means of staying execution of the judgment against it while pursuing its appeal". (PB 6) Nothing could be farther from the truth. The Second Circuit's "narrow holding" was carefully limited to a situation where the *undisputed* facts demonstrate: (a) that posting a mandatory $12 billion bond would be "impossible" not just for Texaco, but for any judgment debtor (A35); (b) that "inflexible" adherence to a state's non-discretionary lien and bond provisions by a judgment creditor vested with state power would render the judgment debtor's guaranteed right to appeal "an exercise in futility"—a "meaningless ritual"—by "irrevocabl[y]" destroying the judgment debtor prior to appellate review (A24, A44); and (c) that imposition of security would be "unnecessary" to protect the judgment creditor pending appeal (A44-46). It was on those undisputed facts that the Second Circuit concluded that application of the lien and bond provisions "lacks any rational basis". (A24)

Pennzoil does not—and cannot—dispute any of the factual predicates for that holding.[19] The Second Circuit's due process ruling follows from them inexorably.

---

[19] Incredibly, however, Pennzoil asserts that if Texaco is dismantled through liquidation or bankruptcy, its property would not be destroyed, but "merely transferred to new owners". (PB 32 n.26) Pennzoil overlooks the fact—as this Court recognized in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)—that the destructive impact of bankruptcy constitutes irreparable injury since it "might well" render "a favorable final judgment useless".

This Court has consistently held that once a state creates adjudicative processes for resolution of claims by private citizens, access to those adjudicative processes cannot be limited, conditioned or withdrawn without comporting with due process requirements.[20] Specifically, in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court held that, having established an appellate system, a state must "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"—so as to assure that appellate access is not rendered "a meaningless ritual".[21]

Acknowledging *Evitts'* teaching, Pennzoil concedes, as it must, that the Due Process Clause "prohibit[s] states from imposing *irrational or arbitrary requirements* on the appellate opportunities they choose to make available". (PB 45; emphasis added) Yet Pennzoil fails to explain why application of the lien and bond provisions *in the circumstances of this case* would not, by destroying Texaco, irrationally deprive it of its right to a meaningful appeal—an appeal "clear[ly]" raising "non-frivolous" federal and state issues (A42).[22] Indeed, given the *undisputed* finding below—that application of the Texas security provisions would be *both* destructive of Texaco *and* unnecessary to protect Pennzoil during the appellate process (A44-

---

[20] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426-27, 430 n.5, 431-33 (1982) (relying on "cases involving access to courts"); *see id.* at 444 (Powell, J., concurring in the judgment: "I agree that the challenged statute as construed and applied in this case, failed to comport with this minimum [rationality] standard").

[21] 469 U.S. at 393-94, 401. In so ruling, the Court flatly rejected the contention that because a state "need not establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it chooses to have such a system". *Id.* at 400. As *Evitts* declared, "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms". *Id.* at 400-01.

[22] The "non-frivolous issues" identified by the Second Circuit included (a) whether disqualification or a mistrial should have been declared after the first judge assigned to the case accepted "a '$10,000 campaign contribution'" from Pennzoil's lead trial counsel "without disclosure to Texaco", (b) whether the successor judge misapplied governing law with respect to the contract, tort and punitive damages issues, (c) whether the alleged Pennzoil-Getty contract "was void and unenforceable", *inter alia*, as violative of SEC Rule 10b-13, (d) whether "an improper method was used" to compute compensatory damages, and (e) whether the Judgment violated, *inter alia*, the Commerce and Supremacy Clauses of the United States Constitution. (A42)

(Footnote Continued)

47)—the evisceration of Texaco's appellate rights does not even pass "the test of minimum rationality" (PB 49).[23]

In an attempt to avoid this conclusion, Pennzoil makes several arguments. None has merit.

First, Pennzoil contends that "Texas has not . . . limited Texaco's appeal rights as such" because compliance with the supersedeas bond requirement is not a prerequisite to prosecution of an appeal in Texas. (PB 45-46) That, of course, exalts form over substance. As the court below found, on an undisputed factual record, the operation of the lien and bond provisions in this case would irrevocably destroy Texaco pending appeal and thus "render its right to appeal in Texas an exercise in futility" (A24)—a "meaningless ritual", having been "robbed of any effectiveness". (A43-44, A50-51)

Second, Pennzoil contends that there is "nothing in the least 'irrational' in a decision to favor the security interests of Pennzoil as a victorious plaintiff over those of Texaco as a judgment debtor". (PB 46) But where a "victorious plaintiff" (such as Pennzoil here) has no need for security, it can have no "security interests" to "favor"; and where, at the same time, a "judgment debtor" (like Texaco here) will be destroyed by "favor[ing]" those non-existent "security interests", the

---

The Second Circuit's conclusion that those issues are "non-frivolous" was not, as Pennzoil suggests (PB 42 & n.40), a ruling on the merits of Texaco's state court appeal (or even a comment about the appeal's likely outcome). *See infra* at 47-48 & n.101. It was part of the Second Circuit's assessment of whether there was a showing of irreparable harm to Texaco sufficient to justify a preliminary injunction under Second Circuit standards. As the Second Circuit explained:

> "[O]nly if Texaco's appeal were patently frivolous would we be justified in holding that any threatened harm to it from effective denial of its right to appeal could be labelled inconsequential. The issue before us, therefore, is *not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution.*" (A41; emphasis added)

[23] Pennzoil overlooks the latter limiting aspect of the Second Circuit's ruling (*i.e.*, lack of need for security) in arguing that there is no "principled" distinction between this case and "ordinary cases of judgment debtors unable to post bonds". (PB 34) Unlike Pennzoil, the court in *Oaks v. District Court of the State of Rhode Island*, 631 F. Supp. 538 (D.R.I. 1986), was readily able to perceive that limitation as a meaningful distinction. 631 F. Supp. at 548 (while the Second Circuit observed that Texaco "could nonetheless be expected to satisfy the judgment if its merits appeal failed", "[n]o such assurance can credibly be proffered in the case at bar").

irrationality of applying state security provisions designed for other circumstances is clear. States such as Texas provide access to appellate courts precisely because they recognize that trial court adjudication carries a "risk of an erroneous deprivation".[24] Surely, no rational being would deliberately design a procedure for the interim and unnecessary enforcement of a possibly erroneous trial court judgment that would irrevocably destroy the appellant before the appellate courts had the opportunity to resolve its appeal.[25]

Third, Pennzoil contends that due process is fully satisfied by the adoption of a "general rule" which "presumptively . . . prefer[s] (1) full protection for the winning party against the risk of partial or complete uncollectability should the trial judgment ultimately be affirmed, over (2) full protection for the losing party against the risk of interim harm that may prove impossible to undo in its entirety should the trial judgment

---

[24] *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It should be noted in this connection that both the State of New York and the State of Delaware have taken the highly unusual step of filing *amicus* briefs in the intermediate Texas appellate court urging reversal of the Judgment on the ground that it was the product of a misapplication of the law of their respective jurisdictions—New York law governing the contract, tort and damages issues; and Delaware law governing the fiduciary duty of the Getty Oil board of directors.

[25] The difference between the instant situation and the two cases on which Pennzoil relies is manifest. In *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954) (PB 20 n.8, 48-49 & n.45), this Court assessed whether due process allowed dismissal of an appeal from a $475,000 judgment where the appellant had repeatedly flouted court orders that he deliver $298,000 of out-of-state assets to a receiver for safekeeping pending appeal—the *only* substantial assets the appellant owned. 348 U.S. at 38-39. In sustaining the dismissal, this Court held that where collectability of a judgment "is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration". *Id.* at 44. That has nothing to do with this case, where there is a lack of need for security pending appeal, where there has been no misconduct or flouting of judicial orders by the state court appellant and where there is no evidence that Texaco would unreasonably encumber or fraudulently transfer its assets during the appellate process. (A47)

Equally misplaced is Pennzoil's reliance on *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916). (PB 48-49) There, this Court held that a state could add 10% to the amount of a judgment *if affirmed on appeal* as the cost of the judgment debtor's obtaining a supersedeas bond which suspended execution pending appeal. *Id.* at 263. Because there was no claim in *Stewart*, nor could there have been, that this requirement effectively rendered the defendant's appeal meaningless, that case does not even remotely resemble the instant one.

ultimately be reversed". (PB 46)[26] In effect, Pennzoil is asserting that so long as the Texas lien and bond provisions are not *facially* improper under the Due Process Clause, they can never be improper *as applied*.

Pennzoil's argument is contrary to this Court's holding in *Evitts* that once a right to appellate access is granted, the state must "offer *each* defendant a fair opportunity to obtain an adjudication of *his* appeal".[27] In other words, each individual has a due process right to be free of irrational impediments to meaningful appellate access and cannot be deprived of that right simply because the challenged state scheme might be reasonable in its general application.

Pennzoil's argument is also contrary to this Court's express acknowledgement in *Lindsey v. Normet*, 405 U.S. 56, 65 (1972), that a single bond requirement, valid on its face, might nevertheless be unconstitutional as "applied . . . in specific situations".[28] Indeed, this Court recently reiterated that "as applied" adjudication is the "preferred course" of constitutional decisionmaking, "since it enables courts to avoid making unnecessarily broad constitutional judgments".[29] Thus, Pennzoil misses the point by relying on cases such as *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (PB 49), which sustain the *facial* validity of state statutory schemes.[30]

---

[26] Pennzoil's characterization of the Texas scheme as creating a "presumption" in favor of trial winners is, of course, wrong. Rather than creating a "presumption", Texas has legislated a mandatory rule that applies, without deviation or discretion, in *all* cases.

[27] 469 U.S. at 405 (emphasis added).

[28] *See Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question").

[29] *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985); *see id.* at 3259 ("[b]ecause in our view the record does not reveal *any rational basis* for believing that the Featherston home would pose any threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid *as applied* in this case") (emphasis added). *See also Parham v. J. R.*, 442 U.S. 584, 616-17 (1978); *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

[30] *See id.* at 113 (Blackmun, J., concurring) ("We are concerned here, basically, only with the facial constitutionality of certain provisions of the California Automobile Franchise Act . . .; we are not confronted with any issue of constitutionality of the Act as applied").

The decision below, limited to application of the Texas security provisions to the particular facts of this case, does *not* "countermand" the general state policy choice underlying the adoption of those provisions; nor does it "compel" Texas to opt for a "general rule" more accommodating to the interests of judgment debtors. (*See* PB 47, 48) Nothing done below would preclude a state from adopting a non-discretionary, full-judgment security scheme. Nor, where a state has enacted such a security scheme, would the Second Circuit's result allow the federal courts to provide the judicial discretion the state has opted against—by conducting broad-ranging equity hearings every time a judgment debtor feels inconvenienced.[31]

Rather, the lower court adopted a bright line test for determining when application of such a scheme is *constitutionally* infirm: the Due Process Clause comes into play when—and only when—there is *both* lack of need *and* irreparable injury of such severe magnitude as to jeopardize the right to a meaningful appeal. For it is only in that rare case—where full security is not necessary and would involve destruction of the litigant required to post it—that inflexible application of a non-discretionary, full-judgment security scheme will fail the constitutional test.[32]

---

[31] Pennzoil asserts that "the law in 11 states in addition to Texas requires the posting of a full bond". (PB 47 n.44) None of those states has suggested that the Second Circuit's result puts its scheme in jeopardy. Indeed, six of the states have, by letter to the parties, indicated their intent to appear as amici in this Court in support of the preliminary injunction against Pennzoil (Alabama, Delaware, Louisiana, Minnesota, New Mexico and Oklahoma). (*See* Letter of October 30, 1986, from Robert Stephan To Counsel of Record for Both Parties)

[32] Given the "obviously . . . narrow" reach of the ruling below, the Second Circuit correctly observed that the result will have no greater effect on state supersedeas requirements than the Fifth Circuit's similarly "narrow" decision seven years ago in *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 301 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). (A51) There, the Fifth Circuit held that where a state court tort judgment, if erroneous, would impair serious federal interests, it was impermissible for the state to block otherwise available channels of corrective review. The court sustained an injunction against application of local security provisions which would have deprived the state court defendant of a meaningful opportunity to challenge the state court judgment on appeal. Ultimately, this Court struck down, as applied, the local substantive law at issue on the ground that it impermissibly burdened federally protected conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

(Footnote Continued)

For the same reasons, it is true—but irrelevant—that, as Pennzoil asserts, " '[o]nce having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions' of the scheme adversely affect a given party". (PB 49; brackets in original; citations omitted) That assertion merely supports the conclusion that it is not *facially* unconstitutional to promulgate a security scheme which operates automatically, without judicial supervision or individual tailoring, to require full security in every case. It does not support the conclusion that such a scheme, when *applied* to impose full security that is neither necessary nor possible to satisfy, will accord with due process. And *that* narrow proposition is what this case is about.

II. The Second Circuit Correctly Held That Pennzoil Was A State Actor.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that state action exists in a Section 1983 suit against a private party when (a) a procedural scheme created by statute (b) is challenged as permitting an unconstitutional deprivation of rights (c) caused by the expressly authorized conduct of the private party (d) who, under the scheme, directs and acts jointly with ministerial state officials to encumber the federal plaintiff's property. There is no dispute here that (a) the lien and bond provisions are the products of state action, (b) Texaco's due process claim attacks the constitutionality of those provisions as applied, (c) Pennzoil's threatened conduct is expressly authorized by the provisions, and (d) if invoked, the provisions would have allowed Pennzoil to direct and act jointly with ministerial state officials not only to encumber Texaco's property, but to seize and sell it. Accordingly, the Second Circuit correctly held that *Lugar* compels a finding of state action in this Section 1983 case.

Like *Henry*, the present case involves a judgment that, Texaco argues on appeal in Texas, will punish and deter conduct that federal constitutional and statutory law protects and encourages. Here, as in *Henry*, local lien and bond provisions threatened immediately to make that deterrent effect permanent and irrevocable by precluding Texaco from a meaningful opportunity to raise those serious federal issues in the state appellate courts (and, if necessary, in this Court).

Despite *Lugar's* clear applicability, Pennzoil contends that the Second Circuit erred by treating Pennzoil as a state actor.[33] Pennzoil concedes that Texaco could have properly invoked Section 1983 against the state officials whose conduct Pennzoil controls, but claims that such a suit against Pennzoil itself is nevertheless improper. According to Pennzoil, by permitting that result, the Second Circuit (a) "radically expands" *Lugar* (PB 13); and (b) "drastically erodes the force of the Anti-Injunction Act" (PB 15). Both contentions lack merit.

A. The Second Circuit's Decision Is Well Within *Lugar*.

Pennzoil argues that the Second Circuit expanded *Lugar* because *Lugar* involved security rules that operated pending resolution through *trial* of competing claims to disputed property, whereas the security provisions here operate pending resolution of such claims through *appeal*. (PB 13) To support its argument, Pennzoil asserts that *Lugar* turned on three elements which, according to Pennzoil, are unique to the prejudgment context. In fact, each element is present here as well.

First, Pennzoil stresses that the security procedures in *Lugar* allowed seizure of "*disputed* property". (PB 13; emphasis in original) That is no less true here. The state's decision to provide a process of appellate review—a decision that contemplates the need to correct error committed in the initial phase of adjudication—demonstrates that a live and important "dispute" continues between the parties.[34]

Second, Pennzoil stresses that invocation of the security procedures in *Lugar* was "judicially *un*supervised". (PB 13; emphasis in original) That is also true here. Texas law prevents trial courts from exercising any discretion or supervisory power over invocation of the lien and bond provisions pending appeal. It is precisely because the State of Texas has severed the security issue from pending judicial process that trial winners (such as Pennzoil) who lack need for security may nonetheless

---

[33] Significantly, Pennzoil did not see fit even to argue the state action issue before the district court.

[34] It is for that reason that Texas courts attribute to post-trial security procedures the underlying purpose of maintaining "the status quo"—a purpose not served under the facts of this case. *Renger v. Jeffrey*, 143 Tex. 73, 182 S.W.2d 701, 702 (1944).

employ security provisions to exert settlement pressure on trial losers (such as Texaco) by threatening to destroy them pending corrective review.[35]

Citing *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), Pennzoil contends that the Texas security procedures would not have been "judicially *un*supervised" in this case, because (1) attachment and execution would have come at the end of a "4-½ month trial that . . . involved 'the independent judgment of the state judiciary' "; (2) "the decision presumptively to require [full] security for all [money] judgments was made by the Texas Legislature when it enacted § 52.001 and the Texas Supreme Court when it promulgated Rule 364"; and (3) "the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request". (PB 14-15) None of those assertions supports the conclusion Pennzoil urges.

The "independent judgment of the state judiciary" that was exercised during the "4-½ month trial" was confined to adjudicating the merits of Pennzoil's state law claim. That "independent judgment" did not address the question whether security which is both unnecessary and impossible to satisfy should be required pending appeal. It is that *latter* decision which Pennzoil controls; and it is *only* with respect to its control of that latter decision (not with respect to the "independent judgment" exercised by the state judiciary during the "4-½ month trial") that Pennzoil is deemed a state actor.

The claim that the Texas legislature and Supreme Court "*presumptively* require" full security is factually incorrect. Texas has created an *absolute* rule that full security shall *always* be

---

[35] In fact, the Texas security procedures at issue in the instant case allow far *less* judicial supervision than the Virginia procedures at issue in *Lugar*. As this Court observed, under the Virginia statute, upon the *ex parte* filing of an affidavit alleging need, the petitioner's property was "sequestered . . . although it was left in his possession", and "a hearing on the propriety of the attachment and levy was later conducted". 457 U.S. at 924-25. The attachment would be vacated by the state court upon a failure "to establish the statutory grounds for attachment". *Id.* at 925. In contrast, the Texas security procedures relating to money judgments make *no* provision for *any* pre-attachment showing of need, for *any* judicial review of need—either before attachment or after—or for *any* possibility of judicial vacatur upon a failure to establish need.

required. No presumptions are involved; no adjustment is permitted.[36]

The assertion that the Texas courts can determine whether to require full security is (again) factually incorrect: under the lien and bond provisions, state courts can exercise no such discretion. Alternatively, if Pennzoil is suggesting that in an original action a state court could assess the constitutional propriety of requiring full security in the present circumstances, that is irrelevant to the state action inquiry.[37]

Third, Pennzoil stresses that seizure of property prior to initial resolution of competing claims thereto involves the exercise of "unbridled" power which should be subject to federal constitutional constraints. (PB 13) But the power, through the unsupervised seizure of property, to preclude the meaningful appellate review that ultimately will determine the property's rightful ownership—the power at issue here—is no less deserving of constitutional limitation. Where the state has ceded to a private litigant public power that can be used to control an adversary's access to meaningful appellate review, the danger is especially acute that purely private incentives will lead to abuse of that power.

The presence here of all elements that Pennzoil contends were essential to *Lugar* brings this case well within the scope of that decision. The presence of those elements also demon-

---

[36] Thus, Pennzoil is wrong in contending that the Second Circuit "completely and artificially sever[ed] the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed". (PB 15) It is not the Second Circuit, but the State of Texas itself, that has "severed" security from "the judicial process". It has done so by deliberately creating a scheme in which the judgment loser is entitled to *no* judicial process on "the issue of arranging security pending appeal" and in which full, unsupervised discretion on that issue is placed solely in the hands of private judgment winners.

[37] If it were otherwise, there could never be a Section 1983 suit brought in the federal courts because there is in every state a court of general jurisdiction that can adjudicate constitutional claims in original actions. Certainly, no one would contend that a state official has not exercised state power because a state court could subsequently hear a claim—or has actually made a determination—that he exercised that power unconstitutionally. *Monroe v. Pape*, 365 U.S. 167 (1961). The result should be no different here. Pennzoil, through its exercise of state power, has done nothing that state law forbids; it has done only what state statutes and rules, which are "obviously the product of state action", expressly authorize. *See Lugar*, 457 U.S. at 922.

strates why, contrary to Pennzoil's assertion, the ruling below does *not* support the proposition that a private party's mere "invocation of state judicial proceedings" constitutes state action (PB 16): Pennzoil was a state actor because it could exercise state power without the "invocation of" *any* judicial process at all. Finally, the presence of those elements explains why Pennzoil is wrong in claiming that the "court of appeals ruled that every state-court judgment winner becomes [a state actor] whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged" (PB 8): the state action holding rests on the fact that Texas has ceded to Pennzoil unsupervised public power which may be used—indeed, which Pennzoil attempted to use—to assume control over property that remains *in dispute*.[38] By contrast, upon final judgment after exhaustion of all appeals, a private party's use of judgment enforcement machinery against property no longer in dispute cannot be characterized as unsupervised.[39]

B. The Second Circuit's Decision Does Not Affect The Anti-Injunction Act.

Pennzoil contends that the Second Circuit's holding so expands the Section 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283, that it "drastically erodes", indeed "cannibalize[s]", the Act. (PB 15-16)

---

[38] Pennzoil also overlooks the fact that state action arising from invocation of a local security scheme can support a Section 1983 claim only when (as in *Lugar* and here) that claim challenges the constitutionality of the particular scheme (either on its face or as applied). Because of this required nexus, the state action ruling below does not permit Section 1983 attacks on state court judgments (PB 15) and, therefore, does not affect—far less (as Pennzoil charges) "completely obliterate"—the distinction between private and state action (PB 14).

[39] Pennzoil misconstrues the point of this Court's observation in *Lugar* that its holding was "limited to the particular context of prejudgment attachment". 457 U.S. at 939 n.21. (PB 13) The point of that observation, as its context reveals, was to distinguish the joint private/governmental action involved in an attachment scheme from a private party's "mere invocation of judicial proceedings". The critical "limit[ing]" factors in *Lugar's* state action holding are that a private party is exercising *unsupervised* control of *governmental* power to appropriate *disputed* property—and not whether such appropriation occurs prior to or after completion of the initial phase of adjudication.

In fact, the limited state action ruling below has no impact on the coverage of the Anti-Injunction Act. That ruling allows a private party to be deemed a state actor only where he can control the actions of ministerial state officials. Those ministerial officials are themselves unquestionably "state actors" who can be enjoined by a federal court in a meritorious Section 1983 case. The ruling below, therefore, can apply only where the state action element of a Section 1983 claim is necessarily already present whether or not the private party is himself considered a state actor. Accordingly, the Second Circuit's ruling does not exempt any federal claim from the Anti-Injunction Act that is not already exempt.[40]

C. The Second Circuit's Decision Is Well Within The Fairness Policies Underlying The State Action Doctrine.

As the discussion above demonstrates, the imposition of state action responsibility on Pennzoil was both appropriate and consistent with *Lugar*. With respect to the fairness concerns underlying the state action doctrine, the instant case, far from "expand[ing]" *Lugar* (PB 13), is significantly narrower than *Lugar* itself.

First, this is an injunction action, not a suit for damages. As the *Lugar* dissent noted, it may be unfair to impose damages under Section 1983 where the only conduct charged is a private party's innocent invocation of a seemingly valid state statute.[41] That concern, however, is not implicated where (as here) injunctive relief alone is sought. The only consequence of losing an injunction suit is that the federal defendant will be unable to make unconstitutional use of a state statute. Unlike a

---

[40] Pennzoil's only response to this point is that, although Texaco could have sued a state official, it chose not to do so to avoid *Younger v. Harris*, 401 U.S. 37 (1971). (PB 16) By conceding that Texaco could have sued a state official, Pennzoil concedes that Texaco's Anti-Injunction Act analysis is correct—that, far from "eviscerating" the Act, the ruling below can have no effect on the Act's coverage. Moreover, Pennzoil's suggestion that the choice of federal defendant could have an impact on the applicability of *Younger*—or that the Second Circuit would have allowed *Younger* to be so easily avoided—shows a fundamental lack of understanding of the *Younger* doctrine. *See infra* at 24, *et seq.* Although a private party, Pennzoil was the decisionmaker under the state security scheme, and, therefore, was the most logical federal defendant.

[41] 457 U.S. at 956 n.14 (Powell, J., dissenting).

damages award, that is a "burden" to which the private party would be no less subject even if he were not a "state actor"—and even if state officials were, therefore, the only available defendants.[42]

Second, there concededly were other state actors who could have been named as defendants in the instant case, and, if Pennzoil had not been named, it undoubtedly would have fought long and hard to intervene and assume the very burdens of defense which would have resulted from its being named as a defendant in the first place. This demonstrates that, in the context of an injunction action like this one, a private party faces the same choices regarding the burdens of defense, whether or not he is deemed a state actor. That is obviously not true in a damages action, where if a private party is not named as a defendant he will have no reason to intervene.[43]

Third, in the instant case, the private party's invocation of state procedures would not have been wholly innocent or unwary. Pennzoil repeatedly disclaimed the need for security for its Judgment,[44] and was certainly aware that application of the lien and bond provisions would have had an irrevocably destructive impact on Texaco. Hence, Pennzoil's only plausible reason for resorting to the local security provisions would have been to preclude appellate review. That fact readily distinguishes this case from others in which the private party

---

[42] Pennzoil asserts that it is "astounding" to suggest that this case is narrower than *Lugar* because it is " 'solely an injunction action, not a suit for damages' ". (PB 16) According to Pennzoil, the Anti-Injunction Act "has restrained federal power ever since 1793 precisely because *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion". (*Id.*; emphasis in original) Pennzoil misses the point. With regard to the comity concerns underlying the Anti-Injunction Act, the state action holdings in *Lugar* and this case stand on equal footing—neither permits an injunction to issue which would not otherwise have been permitted. *See supra* at 21-22. In contrast, with regard to the distinct concerns that arise where state responsibility is sought to be attributed to a private party, *Lugar*—a damages action—may have an intrusive impact that this case does not have.

[43] For the same reason, any possible award of attorney's fees against a losing federal defendant in the kind of injunction action presented here is different from a damages award.

[44] *See supra* at n.13. Indeed, as mentioned, in state court pleadings filed *after* this Court noted probable jurisdiction, Pennzoil continued to disclaim the need for security.

invokes a "seemingly valid statute" wholly unaware that an infringement of rights may result.

In sum, the instant case offers no reason to reassess this Court's state action doctrine.

III. The Second Circuit Correctly Held That *Younger* Abstention Is Not Warranted.

Pennzoil contends that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), precludes the limited relief granted below. *Younger* and its progeny stand for the proposition that ordinarily a federal court should not (a) interfere with a pending state judicial proceeding (by preventing a state adjudicator from completing deliberations properly begun), where (b) the subject matter of the proceeding implicates a "vital" or "important" state interest and (c) the federal plaintiff has a timely and adequate opportunity to have his federal claims adjudicated in the pending state suit. Where those prerequisites for *Younger* abstention are not present, "federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them".[45] None of the prerequisites is present here.

A. The Narrow Relief Below Does Not Enjoin An Ongoing State Judicial Proceeding Affecting A "Vital" Or "Important" State Interest.

The limited relief below has not interfered in any way with Pennzoil's underlying state court tort action against Texaco. After Texaco secured federal relief, Pennzoil's state suit continued through denial of Texaco's new trial motion and the filing and submission of Texaco's appeal from the Judgment in the Texas Court of Appeals. That appeal is now *sub judice*.

Nor is any state interest—"important" or otherwise—implicated in Pennzoil's state suit. It is a purely private action between purely private parties regarding purely private alleged wrongs. Indeed, the State of Texas expressly represented to the Second Circuit that it "has no interest in the underlying [state court] action". (A34; Tex. Br. at 2)

---

[45] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238-39 (1984).

The only interference even arguably caused by the federal injunction is with Pennzoil's threatened invocation of the Texas lien and bond provisions. However, that threatened invocation does not satisfy either the "pending judicial proceeding" prong of *Younger* or the "important" state interest prong.

First, the Texas lien and bond rules do not provide for *any* judicial process whatever. With regard to the need for security, the state has placed complete decisional authority, unsupervised by judicial officers, in the hands of private litigants. Under the lien and bond provisions, the Texas judiciary plays no role. There is *no* notice; there is *no* return date; there is *no* hearing.[46] There is, in short, *no* judicial process relating to security with which the federal injunction could interfere.[47]

Second, even if Pennzoil's unsupervised invocation of the lien and bond provisions could be deemed a state judicial proceeding for *Younger* purposes, it does not implicate the type of "vital" or "important" state interest necessary to trigger *Younger* abstention.

This Court's *Younger* decisions demonstrate what an "important" or "vital" state interest is and why no such interest is present here. In each case where an "important" or "vital" state interest was found, the state, through the exercise of its discretion, had concluded that public policy required that a state enforcement action be brought against the federal plaintiff; the state or an agency of the state was itself a party to that enforcement proceeding; and the proceeding was "quasi-criminal" in nature or involved public responsibilities or public welfare concerns that were being protected by the state as a party.[48] None of those factors is present here—where a purely

---

[46] *Compare Trainor v. Hernandez*, 431 U.S. 434, 446 n.9 (1977) (in finding a state attachment to be a proceeding " 'pending' *in the state courts* within the *Younger* and *Huffman* doctrine", this Court relied upon the fact that "the attachment . . . contained a return date on which the parties were to appear in *court* and at which time [the state defendants] would have had an opportunity to contest the validity of the attachment") (emphasis in original).

[47] Through its Fed. R. Civ. P. 62 "stipulation", Pennzoil itself had to resort to federal law in an attempt to insert into the Texas security scheme the judicial process that Texas has deliberately chosen to exclude.

[48] For example, in *Trainor*, this Court emphasized that the state attachment proceeding was an "ongoing civil enforcement action . . . brought by the

private party in a purely private dispute has threatened to take advantage of a state security scheme for purely private reasons.[49]

Three other factors that are present here underscore the absence of any *Younger* interest. Unlike any other *Younger* case: (a) here the federal defendant has purported by "stipulation" to *waive* the local security provisions—the very provisions it asserts embody "vital" state interests (PB 20)—and replace them with *federal* procedures;[50] (b) here the only state that could arguably have an "important" interest in application of the local security provisions at issue—the State of Texas—was a party below but is neither an appellant nor a participant in this Court;[51] and (c) here it is the federal defendant who seeks to disrupt the state adjudicative process (by destroying Texaco's

---

State in its sovereign capacity" to "vindicate important state policies such as safeguarding the fiscal integrity of [public-assistance] programs". 431 U.S. at 446. In *Moore v. Sims*, 442 U.S. 415 (1978), this Court pointed out that "the State here was a party to the state proceedings" and that "the temporary removal of a child in a child-abuse context" implicates "vital concerns" similar to those which have "determine[d] the applicability of *Younger-Huffman* principles as a bar to the institution of a later federal action" in other cases. 442 U.S. at 423. In addition, in both *Trainor* and *Moore*, this Court stressed the "eviscerat[ing]" impact on the overall state administrative scheme resulting from the breadth of the federal plaintiff's claims. *Trainor*, 431 U.S. at 439, 445-46; *Moore*, 442 U.S. at 426-28.

See also Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc., 106 S. Ct. 2718, 2723 (1986) (Ohio Civil Rights Commission's enforcement of state laws prohibiting sex discrimination involves "a sufficiently important state interest to bring the present case within the ambit of the cited authorities"); *Juidice v. Vail*, 430 U.S. at 335 ("A State's interest in the contempt process . . . is surely an important interest. . . . [W]e think it is of sufficiently great import to require application of the principles of [*Younger* and *Huffman*]"); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (state bar disciplinary proceedings to enforce "the professional conduct of attorneys it licenses" are matters in which the state "has an extremely important interest").

[49] This case involves neither of the two levels of public decisionmaking (*i.e.*, an enforcement decision and an adjudicative decision) which, in this Court's other *Younger* cases, state law had interposed as screens against the potential misapplication of state power. In each of those *Younger* cases, federal injunctive relief threatened to interfere with both levels of public decisionmaking. The federal relief in the instant case interferes with neither.

[50] That purported waiver suggests that even Pennzoil does not believe that the local provisions evidence an "important" state interest. Nor can Texas have a "vital" state interest in application of the federal procedures.

[51] *See Diamond v. Charles*, 106 S. Ct. 1697, 1702-04 (1986).

right to a meaningful appeal) and the federal plaintiff who seeks to avoid that result.[52]

Pennzoil makes several arguments in an attempt to bring this case within the scope of *Younger*. None has merit.

As its lead argument, Pennzoil contends that if it is properly deemed a "state actor" for Section 1983 purposes, that by itself warrants federal court abstention. According to Pennzoil, "[i]f Pennzoil is to be deemed 'the state' for § 1983 purposes", that must be because it is "a surrogate wielding the *public* powers of the state", and "if the public powers of the state are in fact implicated, *Younger* concerns come into play *for that very reason*". (PB 18-19; emphasis in original) There are three fundamental flaws in this argument.

The first is that Pennzoil has the basic relationships reversed. The fact that, with regard to security, Pennzoil is "a surrogate" for the state is flatly *inconsistent* with there being any comity concern at all—far less the specialized concern with state adjudicative process that *Younger* is meant to protect. Pennzoil is "a surrogate" for the state because the decision on whether security is needed is made, not by the state judiciary, but solely by Pennzoil. Unlike the state judiciary, however, Pennzoil has *not*, as a condition to exercising that public power, subordinated its own private concerns to the broader public welfare. Pennzoil carries with it no presumption (like the state adjudicator) that its decisions will be detached and balanced, or that (like all state officials) its actions will be guided by the public interest and with due regard for constitutional norms.

The undisputed facts of this case show that the opposite is true. Pennzoil has used the power conferred upon it by the State of Texas not to vindicate the security policy underlying that delegation of power, but in an attempt to achieve a private litigation advantage not contemplated by the rules—*i.e.*, to coerce a settlement and preclude corrective review. That kind of unilateral exercise of public power for private purposes has never received the deference heretofore reserved for the deliberations of independent state adjudicators. It should not now.[53]

---

[52] Thus, the traditional alignment of interests in *Younger* litigation is here reversed.

[53] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). Pennzoil claims that the failure to accord its exercise of public power the same

The second flaw in Pennzoil's argument is illustrated by its "important" state interest analysis. Pennzoil asserts that the decision on "how best to adjust a generic statutory rule to unusual circumstances" embodies the type of "very significant interest" that *Younger* is meant to protect. (PB 21) But Pennzoil does not explain why, if Texas has a "very significant interest" in such "adjustment", it has, by abdicating state power, deliberately divested the state judiciary of the minimal discretion needed to enable the "adjustment" to occur and has placed the issue in the hands of a private party who has every incentive to block the "adjustment".

The third flaw in Pennzoil's argument stems from the assertion that "if the public powers of the state are in fact implicated, *Younger* concerns come into play *for that very reason*". (PB 18-19; emphasis in original) In all state judicial proceedings, "the public powers of the state are implicated". If that were sufficient to trigger *Younger*, the careful "state interest" inquiry made by this Court in each *Younger* case would be inexplicable. The "important" state interest requirement would be read out of the law and *Younger* would automatically apply to all state civil litigation—a consequence this Court has expressly said is "not remotely suggest[ed]" by its *Younger* decisions.[54]

Pennzoil next contends that to the extent *Younger* requires an "important" state interest, that interest is found here in the efficacy or collectability of private state court judgments. (PB 20) Again, Pennzoil's argument has three flaws.

---

deference accorded public officials exercising that same power will have "the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies". (PB 22) But where a private party has power to control its adversary's access to corrective review, the danger that such power will be abused is far *greater* than when state power is exercised by responsible state officials. There could be no better proof of that axiom than the present case. A private party acting in these circumstances lies, not at the "margins", but at the core of the policy of Section 1983, which is to prevent abuse of power "under color of state law". Such a private party would not be deserving of comity even if *Younger* had no pending judicial proceeding or "important" state interest requirements.

[54] *Moore*, 442 U.S. at 423 n.8.

The first arises from Pennzoil's misplaced reliance on *Juidice v. Vail*, 430 U.S. 327 (1977), which Pennzoil asserts demonstrates that a "privately-initiated" judgment debt collection procedure can itself supply the "important state interest" required to trigger *Younger*. (PB 20) More than any of this Court's *Younger* decisions, *Juidice* demonstrates why Pennzoil's theory is wrong.

The *Juidice* opinion could not have made it plainer that the focus of the Court's analysis—the "important" state interest involved there—stemmed from the state judiciary's use of the contempt process, and *not* from the particular private interest that contempt proceedings happened to serve.[55] The *Juidice* federal plaintiff "had ignored for a period of more than nine months every stage of the state-court proceedings in which he had been a defendant".[56] Contempt was the state's method of punishing him for his disobedience. The Court emphasized that the federal plaintiff had committed " 'an offense to the State's interest . . . as great as it would be were this a criminal proceeding' ".[57]

Pennzoil has confused the particular private interest that contempt in *Juidice* served with the state judiciary's use of the contempt process itself. If the collectability of private judgment

---

[55] 430 U.S. at 335-36 & n.12. This Court in *Trainor*, 431 U.S. at 443-44, described the contempt proceedings in *Juidice* as "similar to state civil enforcement actions", such as the quasi-criminal action in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *See also Moore*, 442 U.S. at 423 (*Juidice* involved "enforcement of contempt proceedings").

[56] 430 U.S. at 330. Prior to instituting a federal action, the federal plaintiff in *Juidice* had (a) defaulted on a loan; (b) failed to appear at the state court trial of the creditor's collection suit, thereby subjecting himself to a default judgment; (c) failed to challenge the judgment by appeal or otherwise; (d) refused to satisfy the judgment; (e) failed to respond to deposition subpoenas meant to enable the judgment creditor to locate his assets; (f) refused to appear when summoned by the state court to explain his refusal to respond to the deposition subpoenas; (g) refused to pay a fine imposed by the state court as punishment for his contempt in refusing to respond to the summons; and (h) was incarcerated and released upon payment of the contempt fine. *Id.* at 329-30.

[57] 430 U.S. at 336 (quoting *Huffman*, 420 U.S. at 604). It is, of course, clear why contempt proceedings implicate important state interests. The contempt power enforces the principle that dissatisfied litigants must challenge state judicial action by lawful process rather than through private disobedience. No principle is more central to the integrity of the state's judicial function, or to its sovereign status.

debts were in fact an "important" *Younger* interest, as Pennzoil claims, *Juidice* would have been the ideal case to articulate such an interest, given the state defendant's particularly egregious efforts there to evade satisfaction of a final judgment. This Court, however, did just the opposite. It described the judgment debt collection function as involving "purely private concerns", and it expressly contrasted the state's vital interest in contempt with those private interests (such as collection of judgment debts) in aid of which contempt may sometimes be invoked.[58]

The second flaw in Pennzoil's analysis is that if, for *Younger* purposes, an "important" state interest can be identified in the efficacy or collectability of judgments, there is no reason why such an interest would not also be identified in any other state court order. All federal injunctions issued pursuant to *any* exception to the Anti-Injunction Act carry the possibility of impact on the efficacy of state court decisions. To apply *Younger* automatically wherever such a possibility exists would (once more) erase the "important" state interest requirement.

The third flaw in Pennzoil's analysis is that, even if efficacy or collectability of private judgments were an "important" state interest for *Younger* purposes, it is an interest with which the result below does not interfere. Where, as here, the judgment creditor concededly has no need for security, an injunction against imposition of security will have no impact on the state scheme for securing and collecting judgments—far less, the "eviscerat[ing]" impact which this Court has noted as a basis for abstention in *Younger* cases involving "important" state interests.[59]

Pennzoil raises the spectre that under the Second Circuit's ruling, all "procedural and structural rules governing the judicial processing of private disputes" are "easy prey to federal collateral attack during on-going state court proceedings", since "invocation of state judicial proceedings" makes the state plaintiff a "state actor" and, according to the Second Circuit, *Younger* "is . . . inapplicable". (PB 22 n.11)

---

[58] 430 U.S. at 336 n.12.

[59] *See Trainor*, 431 U.S. at 445-46; *Moore*, 442 U.S. at 427-28.

Pennzoil is wrong. Nothing below even remotely suggests that "invocation of state judicial proceedings" makes a private party a "state actor". To the contrary, it is only when (as here) the state removes discretion from the courts and places it in the hands of a private litigant that the latter can be considered a "state actor" for Section 1983 purposes and that the comity concerns which this Court has identified in the *Younger* line of cases cannot arise. Where there is a process by which state courts exercise discretion—as provided in the vast bulk of "procedural and structural rules governing the judicial processing of private disputes"—suing the private state court litigant will not provide a Section 1983 entree into the federal courts.[60]

Finally, the present case falls within the "extraordinary circumstances" exception to *Younger*. Pennzoil asserts that this "exception" applies only in situations involving "bad faith" or "harassment". (PB 32) According to Pennzoil, "[t]ypical examples" of such situations are state obscenity prosecutions "in which no conviction is hoped for and in which it is the prosecution in and of itself that constitutes a constitutionally cognizable injury to First Amendment rights". (PB 32 n.27)[61]

---

[60] Nor will such an entree be possible by suing a state judicial officer. Until he acts—by exercising discretion—there will be no "state action" for Section 1983 purposes; and, until then, a claim of injury would ordinarily be too speculative to satisfy Article III. *O'Shea v. Littleton*, 414 U.S. 488, 493-99 (1974). Once the state judicial officer does exercise discretion, doctrines such as *Rooker/Feldman* and res judicata would come into play; direct review of the state court result would then generally have to be through the state court system and ultimately to this Court pursuant to 28 U.S.C. § 1257. *See infra* at n.95.

[61] Pennzoil reads the "extraordinary circumstances" exception too narrowly. After discussing the types of "extraordinary circumstances" identified by Pennzoil, this Court in *Younger* expressly recognized that "[o]ther unusual circumstances calling for federal intervention might also arise, but *there is no point in our attempting now to specify what they might be*". 401 U.S. at 54 (emphasis added). Subsequently, this Court stated that "*Younger* left room for federal equitable intervention . . . where there is a showing of 'bad faith' or 'harassment' . . . *or where there exist other 'extraordinary circumstances* in which the necessary irreparable injury can be shown *even in the absence of the usual prerequisites of bad faith and harassment.*' " *Trainor*, 431 U.S. at 442 n.7 (quoting *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975) (emphasis added)).

Furthermore, while Pennzoil asserts that the only thing that makes this case " 'unique' or 'extraordinary' " is "the size of the judgment" (PB 35), that ignores the facts that actually combined to create the exigencies here: the

Even under Pennzoil's artificially constricted view of the "extraordinary circumstances" exception, "bad faith" or "harassment" does exist here. Concededly having no need for security, Pennzoil insisted on strict application of the lien and bond provisions, with the objective of forcing Texaco to settle the underlying merits proceeding, thereby insulating the Texas trial court Judgment from any review at all. Although Pennzoil now argues that Texas procedural rules are sufficiently flexible to allow effective and timely constitutional challenge to the lien and bond provisions (PB 26-27), before the Texas courts it insisted that, in making a challenge, Texaco strictly adhere to local rules that Pennzoil surely knew would have delayed or totally blocked access to any relief.[62]

This is not the conduct of someone who is acting in good faith. This is not the conduct of a party seeking to advance the policies underlying the state security scheme. Rather, it is conduct no different from that of the state prosecutor in Pennzoil's hypothetical—both are using state statutes, not for their intended purposes, but to block the exercise of constitutional rights. The comity values Pennzoil invokes should not be employed in the service of such behavior.

B. Texaco Lacked An Adequate And Timely Remedy In The Local Forum.

Apart from its other prerequisites, in order to establish *Younger* abstention, Pennzoil must show that Texaco had "an opportunity to fairly pursue [its] constitutional claims in the

---

conceded lack of need for and impossibility of security; the short period of time in which Texaco had to act before suffering irreparable harm to constitutionally protected rights; the lack of any identifiable or proven state procedural avenue by which to raise its constitutional challenge; and Pennzoil's own lack of cooperation, which exacerbated the situation.

[62] Indeed, Pennzoil is using this very appeal as a settlement tactic. On February 21, 1986, the day after the Second Circuit's decision, Pennzoil's chairman was reported in the *New York Times* as saying that "Pennzoil probably would not appeal the latest ruling". *New York Times*, Feb. 21, 1986, at D1, col. 6. On March 25, 1986, four days after Pennzoil filed its notice of appeal to this Court, its lead counsel, Joseph D. Jamail, was quoted in the *Wall Street Journal* as stating that "[a]ny banker that loans money to [Texaco] now is a lunatic". *Wall Street Journal*, Mar. 25, 1986, at 7, col. 1.

ongoing state proceedings".[63] That is a burden Pennzoil has not met.

Pennzoil begins its discussion of state remedies with two assertions, both of which are inaccurate. *First*, Pennzoil states that, when Texaco decided to raise its due process challenge, it was subject to no exigency but rather was immune from any harm for a period of "3½ months". (PB 23) According to Pennzoil, the Second Circuit "freely acknowledged" and "Texaco nowhere denies" this point. (PB 23, 28 n.18)

Pennzoil is wrong. When Texaco moved for emergency federal relief on December 17, 1985, it *then* stood on the brink of bankruptcy. The company's viability was *then* measurable—not in months —but in days (perhaps hours). Far from "freely acknowledging" that no harm could occur for "3½ months", the Second Circuit expressly recognized that drastic harm was imminent (A40).[64]

Second, Pennzoil asserts that the Second Circuit based its inadequacy of remedies conclusion on an assumption "that the Texas courts would, if asked, simply refuse to safeguard federal and state constitutional rights and would instead mechanically apply the supersedeas bond rule as written". (PB 31) Pennzoil condemns such "forecasts of futility" (PB 24-25 n.13) about the result on the merits of Texaco's constitutional challenge.

Pennzoil is wrong. The Second Circuit *never* assumed that the Texas judiciary would ignore federal law. To the contrary, as part of its examination of the adequacy of state remedies, the Second Circuit assumed that Texaco would *ultimately prevail* on

---

[63] *Juidice*, 430 U.S. at 337. *See also Middlesex*, 457 U.S. at 432, 436 n.14 (the bar disciplinary hearings there "constitute[d] an ongoing state judicial proceeding", which distinguished the case from others "in which there was no ongoing state proceeding to serve as a vehicle for vindicating the constitutional rights of the federal plaintiff"); *Moore*, 442 U.S. at 425 ("[t]he pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings"); *Hawaii Housing*, 467 U.S. at 237 (*Younger* abstention requires that "federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests").

[64] The Second Circuit stated, for example, that "[*i*]*mmediately following entry of the Texas judgment* on December 10, 1985, Texaco . . . faced a serious crisis" (A10; emphasis added); that "if resolution of [Texaco's] claims is to be effective, prompt judicial action is essential; *time is of the essence*" (A35; emphasis added). *See supra* at 5 & n.10.

its constitutional challenge within the Texas state system. (A37-38) The basis for the Second Circuit's ruling was that, given the exigencies and immediate threat of Texaco's destruction—and given the lack of cooperation by Pennzoil (A35-36)—there was substantial uncertainty about whether there was a procedural scheme in Texas that could provide *timely* relief, in a situation where uncertainty could not be tolerated. (A35-38)[65] That ruling, based on a full record relating to local procedures and the exigencies of the situation, is plainly correct.

Analysis of the adequacy of local remedies must begin with the central fact that, due to the deliberate decision by Texas to remove judicial supervision from the lien and bond provisions, the security scheme itself provides *no* process—adequate or otherwise. Under *Trainor v. Hernandez*, the inquiry need go no further. There, having determined that the two threshold requirements of *Younger* had been satisfied, this Court confronted the question whether the federal plaintiffs' constitutional challenge to the state attachment scheme could be raised and timely adjudicated "in the pending attachment proceeding"—*i.e.*, at the court hearing noticed for a return date in the attachment.[66] Because there was sharp disagreement on the issue, which was "heavily laden with local law", and because (unlike in the present case) the issue had not been addressed by the lower court, this Court remanded for assessment of the remedies question.[67]

On remand, the federal district court found that the purpose of state judicial supervision over attachment appeared to be limited to testing the truth of the factual allegations supporting the attachment, that there was no appeal as of right from an order of the lower state court and that there was no

---

[65] This Court has repeatedly emphasized that "a necessary predicate for a *Younger* dismissal" is " 'the opportunity to raise and *have timely decided* by a competent state tribunal the federal issues involved' ". *Huffman*, 420 U.S. at 594 (emphasis added) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)).

[66] 431 U.S. at 446 n.9, 447 n.10. Although the attachment was collateral to a simultaneously instituted merits proceeding, on the question of adequacy of remedies this Court looked only to the attachment scheme *itself* (which —as here—was the target of the federal injunction).

[67] 431 U.S. at 447 & n.10.

"assurance of a prompt hearing" in the state appellate courts.[68] Those facts made state adjudication of the federal plaintiffs' constitutional claims "unlikely" and "'more theoretical than real'", and left the federal plaintiffs without "an 'adequate' state forum".[69] This Court summarily affirmed.[70]

The importance which *Trainor* placed on whether there was adequate process within the security scheme itself—or within established appellate channels as of right—demonstrates the appropriate context in which the *Younger* remedies inquiry is made. Without a clear and established procedural avenue within the proceeding then pending, the state defendant must engage in a time-consuming effort of trial and error as it searches for an adequate alternative route. Where time is of the essence—as it plainly was here—this Court has never required the federal plaintiff to bear the burdens of uncertainty inherent in such procedural experimentation.

It would have been especially inappropriate to impose those burdens on Texaco in the instant case. When Texaco was required to decide where to raise its due process challenge, it acted subject to the following constraints. *First*, Texaco knew that the Texas security scheme made no provision for process of any kind—adequate or otherwise—to challenge the state's money judgment security requirements.[71] *Second*, Texaco knew

---

[68] *Hernandez v. Finley*, 471 F. Supp. 516 (N.D. Ill. 1973), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979).

[69] *Hernandez*, 471 F. Supp. at 519-20.

[70] *Quern v. Hernandez*, 440 U.S. 951 (1979). That this kind of significant "uncertainty" is equivalent to inadequacy of remedies is supported by this Court's citation to *Hernandez* in *Moore*, 442 U.S. at 425-26 n.9, and is driven home by federal equity practice under the Tax Injunction Act, 28 U.S.C. § 1341. The Tax Injunction Act bars federal relief where there is a "plain, speedy and efficient" remedy within the state court system. *Id.* This Court has held that an "uncertain" state remedy does not satisfy that standard. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 625 (1946) (federal equity practice as codified in the Tax Injunction Act). If "uncertainty" establishes inadequacy in the Tax Injunction Act context, it does so even more compellingly in the present context. That is because the comity concerns there—management of the public fisc—are far greater than any comity concerns even arguably present here; and there time is rarely, if ever, "of the essence", while here time was clearly "of the essence".

[71] That makes this an even clearer case than *Trainor*, in which there was at least a judicial hearing contemplated within the local attachment scheme—and, therefore, at least an argument that a state avenue existed for adjudication of the federal plaintiffs' constitutional claims. Here, in contrast, the state security scheme provides for no such judicial hearing.

that there was critical uncertainty as to whether, upon entry of the Judgment, the trial court presiding over the merits proceeding retained the power to grant relief.[72] *Third*, Texaco knew that, in view of the deliberate decision by the State of Texas that the judiciary should *not* play a role in determining security for money judgments, any search for an alternative procedural route (always uncertain and never required in this context by this Court) would be a hunt for an avenue that, by definition, was being considered for a novel and unintended use. *Fourth*, Texaco knew that, far from receiving the "cooperation of Pennzoil", Pennzoil could be expected (given its behavior up till then) to oppose any novel use of procedures and to raise any available barrier, however technical, to increase the uncertainty and pressure upon Texaco. *Fifth*, Texaco knew that it had at best a few days before the forces impelling it towards bankruptcy overtook its efforts to locate an appropriate procedural avenue.

It was also in these circumstances that the federal district court, through the exercise of its equitable discretion, decided

---

[72] Once the trial court signed the Judgment, its jurisdiction was limited. *See* Tex. R. Civ. P. 329b(e). There is, for example, no Texas authority that would have permitted a constitutional attack on the lien and bond provisions to be then made by motion or other pleading in the pending proceeding. Indeed, cases suggest that it could not have been. *See, e.g., Rocha v. Ahmad*, 676 S.W. 2d 149, 154 (Tex. App.—San Antonio 1984, writ dism'd w.o.j.); *Santa Rosa Medical Center v. Robinson*, 560 S.W. 2d 751, 759 (Tex. App.—San Antonio 1977, no writ); Tex. R. Civ. P. 22, 682. The only procedural route, free from grave doubt, for making such an attack would have been by commencement of an original action.

Moreover, there is no Texas authority which would have permitted the Texas Attorney General to intervene in the pending proceeding after entry of the Judgment. Again, cases suggest that the trial court would not then have had power to permit intervention. *See, e.g., Comal County Rural High School Dist. No. 705 v. Nelson*, 158 Tex. 564, 314 S.W.2d 956, 957 (1958); *Helton v. Kimbell*, 621 S.W.2d 675 (Tex. App.—Fort Worth 1981, no writ). However, notice and an opportunity for the Attorney General to be heard are prerequisites under Texas law to a constitutional challenge to a state statute. Tex. Civ. Prac. & Rem. Code § 37.006(b) (formerly Tex. Rev. Civ. Stat. Ann. art. 2524-1 §11); *Estate of Ross*, 672 S.W.2d 315 (Tex. App.—Eastland 1984, writ ref'd n.r.e.), *cert. denied*, 105 S. Ct. 1844 (1985); *Commissioners Court of Harris County v. Peoples Nat'l Util. Co.*, 538 S.W.2d 228 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); Tex. Rep. Br. at 3 n.1.

The procedural route upon which Pennzoil insisted at the time—that any attack on the collateral security provisions be part of Texaco's new trial motion (*see supra* at 6)—would have run up against these same problems. In addition, given the exigencies of the situation, Texaco did not have the time properly to prepare such a motion—a litigant ordinarily has 30 days to make a motion for a new trial. Tex. R. Civ. P. 329b. Despite the motion's considerable complexity and importance—most error not identified therein is

that emergency relief should be provided.[73] That decision should be disturbed only if it was *then apparent* that there was an established Texas procedure which would have allowed adjudication (acceptance *or* rejection) of Texaco's federal claim in timely fashion. That is, the inquiry here should not be whether, after eleven months of examination, Pennzoil can now identify a route within the Texas system that might conceivably have worked. Instead, the proper question is whether a route could have been located *within a matter of days or even hours* whose efficacy was at that time reasonably clear.[74]

After eleven months, even Pennzoil has been unable to locate any such procedural avenue. There is still not, after all the time Pennzoil has looked at the problem, a procedure whose efficacy is not subject to substantial question.

State mandamus provides a good example. Had Pennzoil chosen to dispute Texaco's factual showing of lack of need or irreparable harm (something that could not have been known beforehand), the Texas appellate courts would have had no

---

waived, Tex. R. Civ. P. 324(b)—Texaco would have had to prepare and file its motion within hours or days, thereby creating a serious risk that appellate points of error would be waived. Then, presumably, Pennzoil would have been given an opportunity to respond and Texaco would have had to request and receive a hearing from the trial court. Finally, under Texas law, the motion could have sat unresolved for up to 75 days after entry of the Judgment, when it would have been overruled by operation of law, Tex. R. Civ. P. 329b(c)—which, in fact, is what happened here.

[73] Indeed, the federal courts in the instant case went beyond the inquiry made in *Trainor* (which, as mentioned, was confined to the state attachment scheme alone (*see supra* at n.66)) and examined the possibility of relief in the pending merits proceeding as well (which in *Trainor* was not explored as a prospective remedial avenue).

[74] The "stipulation" offered by Pennzoil *after* Texaco had instituted its federal suit (A129-30) does not make a difference. The "stipulation" in fact demonstrates that Pennzoil itself believed that there was *no* pre-existing procedural avenue available to Texaco under Texas law.

In addition, as the Second Circuit found, even after the "stipulation" was put forth by Pennzoil, it did "not solve the problem Texaco face[d] in this action". (A48) *First*, the "stipulation" was a mere tactic. During those few tense days in mid-December 1985, when Pennzoil knew that Texaco's existence hung in the balance, Pennzoil insisted that Texaco rigidly adhere to local rules. It was only *after* Texaco had received the protection of a federal temporary restraining order that Pennzoil abruptly changed course and, far from insisting on rigid adherence, purported to oust local rules and replace them with the federal standards of Fed. R. Civ. P. 62.

(Footnote Continued)

power to issue a writ of mandamus. Mandamus lies only when the facts are undisputed.[75]

Given the above *de jure* limitations on mandamus, the Second Circuit would have been justified in ending its inquiry at this point. However, the court did not do so. Instead, it assumed that the Texas courts would entertain the federal constitutional claim and would ultimately rule in Texaco's favor. Even under this assumption, the court concluded that the timeliness of state relief was uncertain.[76]

The additional remedies identified by Pennzoil in its brief to this Court are no better. They are wholly unavailable for discretionary relief from security requirements for money judgments and are even more uncertain than mandamus as vehicles for a constitutional challenge.

Second, the "stipulation" was expressly subject to the trial court's "accept[ance]" (A130)—something uncertain at best, given the fact that acceptance would have required the trial court to act contrary to (a) the intent of the Texas legislature and Supreme Court in removing judicial discretion on security, and (b) the state's interest (which Pennzoil itself has located in the Texas scheme) in eliminating the time and expense of holding individualized hearings on the question of security (PB 49).

Third, after being pressed by the district court at the hearing on Texaco's preliminary injunction motion, Pennzoil counsel finally conceded that, even were the parties to proceed in Texas under the "stipulation", Pennzoil would insist on a bond equal to "the full amount of the judgment". (Transcript of Hearing, Jan. 9, 1986, at 64; *see also* A48)

As a result, the "stipulation" simply added to the financial and business community's justified apprehension and confusion over Texaco's continued viability. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371-72 n.10 (1982) (the fact that a settlement agreement remains subject to court approval creates sufficient uncertainty to prevent mootness); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978) ("tentative nature of settlement" prevents mootness).

[75] *Donald v. Carr*, 407 S.W.2d 288, 292 (Tex. Civ. App.—Dallas 1966, no writ); *see also Johnson v. Hughes*, 663 S.W.2d 11, 13 (Tex. App.—Houston [1st Dist.] 1983, no writ). In addition, as the Texas Attorney General described mandamus before the Second Circuit, mandamus will not be granted unless the applicant has "a *clear right* to the performance of the act requested" and the target of the writ has "a *clear duty* to perform the act". (Tex. Br. at 32 n.10; emphasis added) To the extent that a "clear right" existed here, it was the "right" of Pennzoil, under the mandatory provisions of Rule 364(b), to execute on Texaco's assets absent a supersedeas bond in the full amount of the Judgment; and to the extent a "clear duty" existed, it was the "duty" of the Texas courts not to grant a stay of execution absent such a bond.

[76] Texaco would have had to "expend precious time" asking the Texas trial court for relief (A37; *see also Donald*, 407 S.W.2d at 291)—relief which,

1. Tex. R. Civ. P. 365(b)

Pennzoil first asserts that, under Tex. R. Civ. P. 365(b), "Texaco could have sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond*". (PB 28; emphasis in original) This claim is based on the dubious assumption that Rule 365(b) confers the very discretion that Rule 364(b) eliminates (that is, discretion to consider whether, in a money judgment case, a bond in the amount of the judgment, interest and costs is excessive).

Not surprisingly, the express terms of the rules make clear that Pennzoil's assertion is wrong. Rule 365(b) gives the appellate courts power to review a bond for excessiveness where the bond has been "fixed by the trial court". However, under Rule 364—the general grant of authority for supersedeas bonds—only certain specified bonds are (or can be) "fixed by the trial court".[77] None is a bond for a *money judgment*. Accordingly, bonds for *money judgments* do not fall within the category of those which the appellate courts, under Rule 365(b), may "review for excessiveness".[78]

---

because the Judgment had already been entered, the trial court had doubtful power to provide, and therefore could not have had "a clear duty" to grant. *See supra* at nn.72 & 75. Indeed, the Texas Attorney General conceded below that it was "most likely" that *any* trial court—even one of general jurisdiction—would have denied Texaco relief from the security provisions which "the highest court of the state" had made mandatory. (Transcript of Argument, Feb. 11, 1986, at 61-62) Texaco would then have had to file a mandamus petition with the Texas Court of Appeals; if successful on that petition, it would have had to defend a mandamus by Pennzoil to the Texas Supreme Court; if successful there, it would have had to engage in remand proceedings in light of the appellate ruling (including determination of the appropriate amount of security, *Burgher v. Chrisman*, 604 S.W.2d 536 (Tex. Civ. App.—Dallas 1980, no writ)); and if unsuccessful, it would have had to petition this Court for relief under 28 U.S.C. § 1257. (A38) Texaco simply did not have the time to follow such an uncertain procedural route. Moreover, it is worth noting in this connection that neither mandamus nor any other extraordinary writ was even suggested in *Hernandez* to be an adequate remedy.

[77] Rule 364(c) (judgment "for the recovery of land or other property"); Rule 364(d) (judgment "for the recovery of or foreclosure upon real estate"); Rule 364(e) (judgment "for the recovery of or foreclosure upon specific personal property"); Rule 364(f) (judgment "for other than money or property or foreclosure"); Rule 364(h) (judgment in favor of the state or a state agency where "no monetary damages can be shown").

[78] Significantly, Rule 365(a)—which permits appellate review of bonds for "insufficiency"—is not limited to bonds "fixed by the trial court". In

Man-Gas Transmission Co. v. Osborne Oil Co.[79] (PB 29) is not to the contrary. Pennzoil fails to mention that the judgment there included not only money damages but injunctive relief as well. The trial court required a corporate surety on the bond to supersede *both* parts of the judgment.[80] The appellate court struck the corporate surety requirement. However, since under Rule 365(b), the appellate court clearly had power to review the bond as to the injunctive part of the judgment, *Man-Gas* does not support the proposition that the court acted pursuant to power to review a money judgment bond.[81]

2. "Vested" Power

Pennzoil next asserts that the trial court is " 'vested' with the power 'to grant a temporary injunction to prevent damage to an appellant', when enforcement of a civil judgment would render the right to appeal 'meaningless' ". (PB 29) To support

---

particular, since a money judgment bond must be "at least" the size of the judgment, interest and costs, Texas has created a procedural channel for the trial winner to obtain review of whether such a bond satisfies that minimum amount.

[79] 693 S.W.2d 576 (Tex. App.—San Antonio 1985, no writ).

[80] It had power to do so because Rule 364(f) provides that a bond to supersede an injunction shall be "fixed" by the trial court. Were it not for the injunctive relief in *Man-Gas*, the trial court would have had no involvement with the bond—and hence no opportunity to impose a requirement constituting a predicate for appellate review. In fact, the language from *Man-Gas* which Pennzoil quotes comes from *Mudd v. Mudd*, 665 S.W.2d 128 (Tex. App.—San Antonio 1983, no writ), which holds that Texas courts have no discretion with regard to money judgment bonds.

[81] Contrary to the representation in Texaco's Motion to Affirm, Pennzoil asserts that it "is simply not so" that to make an application in the Texas Court of Appeals under Rule 365(b) in mid-December 1985 would have required Texaco to waive its new trial motion. (PB 28 n.19) If Texaco is wrong, so is the Texas Attorney General, who stated in his Reply Brief to the Second Circuit that an "accelerated appeal, pursuant to Tex. R. Civ. P. 389a, would have cut short—eliminated—Texaco's opportunity to make [a new trial] motion". (Tex. Rep. Br. at 10 n.8) Whether Pennzoil or the Texas Attorney General be correct, their disagreement illustrates the degree of uncertainty inherent in searching for procedural avenues where none is specified in the rules. Moreover, even if Pennzoil were correct, it would not change the fact that Rule 365(b) does not permit an appellate court to review a money judgment bond for excessiveness; nor would it change the fact that no Texas case has ever held a money judgment bond in the amount of the judgment, interest and costs, to be excessive; nor would it change the fact that Rule 365(b) confers no power on the appellate courts to review the attachment of liens (which can be imposed even if a supersedeas bond is not posted).

this "vested" power theory, Pennzoil cites dictum from a single case—*Pace v. McEwen* ("*Pace* II").[82] (PB 29)

Pennzoil's reliance on the *Pace* II dictum is misplaced. The controversy underlying *Pace* generated two proceedings. In the first, the plaintiff obtained a money judgment which was affirmed on appeal ("*Pace* I").[83] *No* bond was posted and *no* stay of execution was granted. However, in Texas, the "Homestead" provision of the Texas Constitution insulates a judgment debtor's residence from execution,[84] and in *Pace* I, the judgment debtor's sole asset available to satisfy the money judgment was his residence.[85] Thus, during pendency of the appeal in *Pace* I, it was the "Homestead" provision—not any judicial stay of execution—that made execution on the judgment impossible.

After the money judgment in *Pace* I became final (upon exhaustion of appeals), the judgment creditor proceeded under Tex. Rev. Civ. Stat. Ann. art. 3827a for a declaration that the judgment debtor's residence was not exempt from execution under the "Homestead" provision and could be sold to satisfy the money judgment. The trial court ruled that the "Homestead" provision did not apply, and issued a "turnover" order compelling transfer of the debtor's residence to the local sheriff for public sale. It was this "turnover" order that was stayed by the appellate court in *Pace* II.

Pace II, therefore, had nothing to do with the power of Texas trial courts to stay a money judgment pending appeal in the absence of a full supersedeas bond. Rather, it concerned an appellate court stay of an order directing the disposition of specific real property in satisfaction of a money judgment that had already become final. Contrary to Pennzoil's assertion (PB 29 n.20), *Pace* II did *not* implicate Rule 364(b).

---

[82] 604 S.W.2d 231 (Tex. Civ. App.—San Antonio 1980, no writ).

[83] 574 S.W.2d 792 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

[84] Tex. Const. art. XVI, § 50.

[85] *Pace v. McEwen*, 617 S.W.2d 816, 818 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

Despite its "vested" power theory, Pennzoil is unable to find a *single* Texas case where the mandatory requirements of Rule 364(b) have been suspended by any court pending appeal from a money judgment. None exists.[86]

3. Tex. Civ. Prac. & Rem. Code § 65.013

Pennzoil's third claim is that, under Tex. Civ. Prac. & Rem. Code § 65.013, "a Texas trial court has *explicit statutory power* to 'stay a judgment' if the complainant can show himself 'equitably entitled to be relieved against' part or all of that judgment". (PB 29; emphasis in original)

As a threshold matter, Section 65.013 is not relevant here because, in its constitutional challenge to the lien and bond provisions, Texaco does not seek " 'to be relieved against' part or all of th[e] judgment".[87] Moreover, there is no Texas case that would have permitted Texaco to make a Section 65.013 challenge prior to the time the Judgment had become enforceable (and the trial court had lost jurisdiction)—*i.e.*, January 10, 1986, at the earliest. *See supra* at 3. Once the trial court lost jurisdiction, any Section 65.013 challenge would have had to be by original action.[88] And no *Younger* case would require a federal plaintiff to seek relief on his federal claims by commencing an original action in the state courts—that would erase *Younger's* adequate remedy test.[89]

---

[86] Indeed, *Kennesaw Life and Acc. Ins. Co. v. Streetman*, 644 S.W.2d 915, 916-17 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (decided *after Pace* II), expressly reaffirmed the mandatory character of Rule 364(b).

[87] Pennzoil asserts that the 1984 amendments to Rule 364(a) broadened the scope of Section 65.013 and rendered all cases which pre-date the amendments "utterly irrelevant". (PB 29-30) Pennzoil is wrong. According to the Supreme Court Advisory Committee, the amendments made no substantive changes with respect to those parts of the rule at issue here. Minutes, Advisory Committee for the Supreme Court of Texas, Nov. 12-13, 1982, p. 293, excerpted in Appendix C.

[88] Section 65.013 requires the complainant to show himself equitably entitled to relief "in his petition". Tex. R. Civ. P. 22 provides that a "petition" is the vehicle by which a civil suit "shall be commenced".

[89] *See supra* at n.63. Indeed, as Pennzoil itself concedes, a party with a constitutional claim under Section 1983 which he can prosecute as a *plaintiff* in "an original matter" may, under *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), and *Monroe v. Pape*, 365 U.S. 167 (1961), "choose to bring a federal action rather than sue in state court". (PB 5)

4. Inherent Equitable Power

Pennzoil asserts that "[i]f the supreme law of the land requires that Rule 364 be modified as applied to these facts, then a trial court of general jurisdiction certainly has the power to do so, and mandamus would certainly lie to compel that course of action". (PB 31 n.23)

Pennzoil's argument—that if there is a constitutional violation, there *must* be inherent equitable power in the state court system to prevent it—would (again) render irrelevant the inadequate remedy inquiry. Whether or not a state court might find a creative way of circumventing established procedural limitations so as to provide relief in the exigent circumstances of a particular case, the risk of predicting whether that will be done (or hoping that it will) is hardly one which *Younger* places on state court litigants. If it were, the discussion of adequacy of state remedies in all of this Court's *Younger* cases would have been unnecessary. Under Pennzoil's approach, *Trainor* would never have been remanded and, despite the finding of inadequate state remedies on remand, would have been summarily *reversed* not summarily affirmed.[90]

Pennzoil's position, when reduced to its essence, is that Texaco was required to bear the burden of uncertainty and delay within the Texas state court system—no matter how crushing the result. Pennzoil has failed to identify any established route the efficacy of which can reasonably be said to have

---

[90] Citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), Pennzoil asserts that it is "a dubious premise" to assume that "Rule 364's bond requirement is mandatory and a trial court cannot fruitfully be asked or ordered to act beyond its statutory discretion". (PB 30-31 n.23) Pennzoil misunderstands the point this Court was making.

Dayton Christian Schools arose out of an inquiry by the Ohio Civil Rights Commission into a charge of sex discrimination. In the passage relied upon by Pennzoil, this Court made the point that even if a direct constitutional attack on the Ohio sex discrimination statute could not be made during the Commission proceedings, it had to be assumed that if a finding of discrimination in a particular case would violate the Constitution, the Commission would exercise its discretion against finding discrimination. In contrast, here there is no assumption to be made that in setting security, the state courts will be guided by constitutional requirements, because the state courts do *not* set security. 106 S. Ct. at 2724. In addition, the kind of exigency present here did not exist in *Dayton Christian Schools*. *Id.* at 2725-26 (Stevens, J., concurring). As a result, even appellate state court relief there, which existed as of right, would have been timely and sufficient. *See also Moore*, 442 U.S. at 433-35.

been clear and ascertainable in the circumstances in which Texaco was required to act. Pennzoil would put on Texaco the risk of choosing among a "procedural labyrinth",[91] where no particular avenue was clearly right, each appeared clearly wrong and even a single incorrect choice would have had disastrous consequences. Such a risk-shifting rule is not now—and should not become—the law.

IV. The Second Circuit Correctly Held That The Federal Courts Have Subject Matter Jurisdiction Over Texaco's Due Process Claim.

Relying principally on this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), Pennzoil argues that, so long as Texaco could have made its due process challenge to the lien and bond provisions in the Texas state courts, the federal courts are "without [subject matter] jurisdiction" to consider that claim. (PB 42) Nothing in *Rooker* or *Feldman* (or any other case Pennzoil cites) supports Pennzoil's contention.

Rooker and *Feldman* stand only for the unremarkable proposition that the lower federal courts lack jurisdiction to engage in *appellate* review of state court determinations, such power residing exclusively in this Court by virtue of 28 U.S.C. § 1257. The underlying basis for the *Rooker/Feldman* doctrine is simply that it would be destructive of a dual judicial system to permit the lower federal courts to sit in judgment on state court decisionmaking.[92] The *Rooker/Feldman* doctrine excludes from

---

[91] *Marino v. Ragen*, 332 U.S. 561, 565 (1947) (Rutledge, J., concurring).

[92] The claims in *Rooker* and *Feldman* illustrate this principle. In *Rooker*, the federal plaintiff asked the federal court to find "null and void" a contract which the Indiana Supreme Court had already upheld. 263 U.S. at 414. In *Feldman*, applicants for admission to the District of Columbia bar, whom the highest court there had determined in a judicial proceeding to be ineligible, asked the federal court to order the District of Columbia appellate court to allow them to take the bar examination or admit them to practice. 460 U.S. at 486. *See also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286, 293 (1970) (the federal plaintiff is asking the federal courts to "decide that the state court judge was wrong"—that is, is "seek[ing] appellate review of a state decision in the Federal District Court"—in contravention of this Court's exclusive jurisdiction "to review on direct appeal the decisions of state courts").

the subject matter jurisdiction of the federal district courts claims or issues which have already been raised and determined by a state court or which can be decided only by directly reviewing the merits of a state court decision.[93]

Because, in the instant case, Texaco's due process claim in no way required direct review of any state court determination, the Second Circuit correctly held that *Rooker/Feldman* was inapplicable.[94] Pennzoil makes three arguments in an effort to reverse that result. None has merit.

First, Pennzoil contends that Texaco's constitutional claim is in fact "inextricably intertwined" with the state court Judgment. (PB 41)

As explained above, however (*see supra* at n.93), under *Feldman*, constitutional claims are "inextricably intertwined" with local court decisions when, although not raised in or decided by the local court, they can be decided only by directly reviewing the local court's determination.[95] That is not true here.

---

[93] In *Feldman*, this Court explained that the latter type of claim or issue, although not actually decided by a state court adjudication, is nonetheless outside federal district court jurisdiction because it is "inextricably intertwined" with the state court adjudication. 460 U.S. at 486-87 & n.18. This Court also emphasized that a federal claim (there, a facial attack under the Due Process Clause on certain District of Columbia bar admission rules) which neither was raised in the local proceeding nor required a direct review of the local decision, would fall within federal district court jurisdiction—although resolution of the claim might nullify the result of the local proceeding. *Id.* at 486-87. As this Court indicated, the availability of such a claim in the federal courts is not a matter of subject matter jurisdiction, but instead turns solely on the res judicata effect of the local determination. *Id.* at 487-88 & n.19. Under the Full Faith and Credit Statute, a federal court may accord a local determination no greater preclusive effect than local law permits. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Migra v. Warren City School Dist.*, 465 U.S. 75, 81 (1984).

[94] The short-lived and uncertain prohibition against enforcement contained in Paragraph 7 of the Judgment did not constitute a state court determination. As the Second Circuit noted, Paragraph 7 was simply the product of a "consent" agreement between Pennzoil and Texaco. (A7) Moreover, the Second Circuit did "not view the terms of the [federal] preliminary injunction to be contrary or inconsistent with those of Par. 7 of the Texas judgment, which remain in force and must be obeyed until they expire". (A48)

[95] This includes not only determinations on the *merits* in state court actions, but also "procedural and structural" determinations during the course of state court litigation (*e.g.*, discovery orders, evidentiary rulings, scheduling

Texaco's due process attack upon application of the lien and bond provisions was not—and could not have been—raised in the Texas trial court as a basis for reversal of the Judgment (A23); nor does resolution of the claim require direct—or, indeed, any—review of the Judgment (A27).[96] Consequently, even if Pennzoil were correct that the result below has an impact on the Judgment, *Feldman* makes plain that there would be no subject matter bar. In fact, however, Texaco's due process challenge could *never* place the efficacy or collectability of the Judgment in doubt, since the challenge is dependent upon *both* lack of need for security *and* irreparable harm if security is required.[97]

Second, Pennzoil claims that under *Rooker/Feldman* "[i]t is axiomatic that only the court rendering a judgment, and the courts with jurisdiction to hear appeals from that judgment, have power to process such appeals, including power to review

---

orders, etc.) which might form the basis of an appeal from the judgment for the losing state court litigant. Thus, Pennzoil is wrong in arguing that the Second Circuit result "would permit piecemeal shopping trips to federal fora on other procedural and structural issues that can readily be labeled 'collateral' and made the basis of supposedly independent causes of action under § 1983". (PB 44) Where there is state court discretion to rule on those "procedural and structural" issues (there was none here), there will be "case or controversy" and "state action" barriers to a federal challenge before that discretion is exercised. *See supra* at n.60. And once the discretion is exercised, there will be a *Rooker/Feldman* barrier to challenging the result in federal court rather than state court.

Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Ganey v. Barefoot*, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 3484 (1985); *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986); and *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985) (PB 39 n.36, 41 n.39) illustrate this point. In all those cases, the federal court lawsuit advanced claims that sought reversal of a prior state court decision.

[96] Pennzoil asserts that an injunction against enforcement of the Judgment is "a determination that itself cannot be made without evaluating the state court judgment". (PB 42) But that is disproved by the Second Circuit's opinion itself. To the extent the district court purported to comment on the merits of the Judgment, the Second Circuit ruled that "[t]his procedure was clearly erroneous and impermissible as a matter of law". (A47) Far from tailoring security to an assessment of the merits of the Judgment, the Second Circuit stated that "equitable principles" (*i.e.*, the conceded fact that Pennzoil has no need for security) "may have justified a bond in a lesser amount" than that set by the district court (A47-48).

[97] Thus, Pennzoil is also wrong in asserting that because "the [Texas] judicial system is not free even to consider enforcing or securing" the

and correct procedural barriers that are said to limit the value of those appeals—whether by issuing a stay or otherwise". (PB 37)

Pennzoil misconstrues the result below. The lower courts did not act in aid of the appellate jurisdiction of the Texas courts—or of any other court. They acted to preserve Texaco's constitutional rights—the right to be free from the irrational withdrawal of a meaningful appeal. Pennzoil's argument reduces to this: that any ruling which has the result of preserving a litigant's ability to present a claim to a state court is necessarily a ruling in aid of the state court's jurisdiction—and, therefore, a ruling which only the state court possessing such jurisdiction can make. Pennzoil is wrong. Federal courts cannot be divested of jurisdiction to hear claims of deprivation of constitutional rights under color of state law—claims falling within their "original jurisdiction" under 28 U.S.C. § 1343(a)(3)—merely because resolution of those claims might have an impact on state courts. Indeed, it is precisely because Section 1983 was intended to allow impact on state courts that it was deemed an exception to the Anti-Injunction Act.[98]

The critical distinction between action in aid of jurisdiction and action to preserve individual constitutional rights is illustrated by comparing the instant case to one involving an application to this Court for a stay of enforcement pending appeal. In the latter situation, the Court, acting pursuant to its "potential" appellate jurisdiction,[99] would make a preliminary assessment of the merits of the lower court result to determine

---

Judgment, it "is a judgment in name only". (PB 42) Nothing that the federal courts have done has in any way affected the merits of the Judgment, which is now on appeal in the state courts. Once the appellate process is completed (including review by this Court, if appropriate), the federal injunction will expire, and, based as it is on a showing of lack of need for security, the injunction cannot possibly interfere with Pennzoil's ability then to collect the Judgment (assuming the Judgment has not been reversed).

[98] *Mitchum v. Foster*, 407 U.S. 225 (1972). Pennzoil would in fact doubly expand the *Rooker/Feldman* doctrine. Under Pennzoil's view, the *Rooker/Feldman* subject matter bar would extend beyond federal claims that directly review state court judgments (as *Feldman* requires), to reach (a) claims that merely have an impact on state court judgments (expressly included *within* federal subject matter jurisdiction by *Feldman*) and (b) claims that have no impact on state court judgments, but merely might affect the state appellate system (not even considered by *Feldman* as a conceivable basis for a subject matter bar).

[99] *Atlantic Coast Line R.R. Co.*, 398 U.S. at 296.

the likelihood of plenary review and reversal.[100] That is an inquiry the Second Circuit did *not* undertake here.[101]

Third, Pennzoil contends that, even if the result below is neither "inextricably intertwined" with the state court Judgment nor in aid of state appellate jurisdiction, the Second Circuit "nevertheless erred in not directing the district court to impose an exhaustion requirement on Texaco's challenge to the Texas lien and bond provisions". (PB 42) Pennzoil purports to find this "exhaustion" requirement by "prob[ing] beneath the surface [of *Rooker/Feldman*] for the principles of comity that provided the substructure for what this Court held". *Id.*

There is nothing in the "substructure" of *Rooker/Feldman* (whatever that means) to support the result urged by Pennzoil. The basic principle underlying those cases is that the federal judiciary cannot act to oust state courts of their appellate power. Ouster can occur in two ways. *First*, a federal court might attempt to review the merits of a state court judgment. But, as we have shown, that did not happen here. *Second*, a federal court might attempt to reverse a state court decision arising from invocation of ancillary state processes designed to set security pending appeal. But, as we have shown, the Texas security scheme provides for no such processes. Thus, nothing that Texaco or the lower courts have done is contrary to the principles which Pennzoil supposedly locates in the *Rooker/Feldman* "substructure".[102]

Indeed, if anyone here is acting contrary to those principles, it is Pennzoil itself. For it is Pennzoil that has attempted

---

[100] The nature of the inquiry is illustrated by Justice Blackmun's analysis in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1330 (1975) (Blackmun, J., in chambers) (cited by Pennzoil at PB 38 n.34) ("there is a significant possibility that this Court would grant plenary review and reverse"). *See also Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *see generally* Stern, Gressman & Shapiro, *Supreme Court Practice* 693-94 (6th ed. 1986).

[101] The Second Circuit made *no* determination as to whether this Court —or, for that matter, the Texas Supreme Court—would hear Texaco's appeal from the Judgment and *no* assessment of Texaco's likelihood of success on the merits of that appeal. (A41) As mentioned above, the Second Circuit's discussion of the "non-frivolous" nature of the issues raised by Texaco in its state court appeal related only to the question of whether Texaco had established irreparable harm. *See supra* at n.22.

[102] Moreover, the lack of a timely and adequate state court remedy (*see supra* at 32 *et seq.*) would defeat any *Rooker/Feldman* (or Full Faith and Credit) claim, even if (contrary to fact) such a claim otherwise had merit.

to use state security provisions to oust state courts from the exercise of appellate power. It is Pennzoil that has attempted to use doctrines supposedly protective of state appellate power as a means of destroying that power. In so doing, Pennzoil has, as the Second Circuit correctly held, turned "settled law" on its head. (A21-22)

CONCLUSION

In the abstract, the choice between enabling individual litigants to vindicate federal rights in a federal forum and deferring to state court systems in the interests of comity and federalism is not an easy one. One can readily imagine (and Pennzoil in its brief does) hard cases in which these two important interests are in conflict. This is not such a case.

Pennzoil was awarded a Judgment in Texas of unprecedented size, which the two states supplying the applicable law—New York and Delaware—have represented was based upon fundamental trial court error. The size of that Judgment, coupled with the prospect that it would immediately be enforced by liens and execution, would have deprived Texaco of its state-guaranteed right to meaningful appellate review by forcing Texaco's liquidation or bankruptcy before its appeal could be heard. The lien and bond provisions were not necessary to protect the collectability of the Judgment. Pennzoil was threatening to invoke them merely to coerce a settlement and avoid any appellate review.

Further, the local security scheme provided no judicial process by which Texaco could have made any challenge to the security requirements. Nor was there a procedural route in Texas, free from grave uncertainty regarding its utility for making a constitutional attack on the security provisions, in a situation where one wrong choice by Texaco would have been disastrous. At the same time, Pennzoil insisted that the Texas trial court strictly apply local rules and opposed any novel use of procedures, knowing that the result would be to make state relief either impossible or too late. The trial court adopted that inflexible approach. It was only then, with time running out, that Texaco moved for emergency injunctive relief in the

federal district court. And, despite its intransigence in the Texas court, Pennzoil abruptly switched gears before the federal court and purported to "waive" the local security provisions—which it claims embody an "important" state interest—and replace them with federal law.

In sum, there is in this case not a single comity factor weighing on the side of federal abdication of jurisdiction, while there is a compelling need to vindicate Texaco's constitutional claim. For the reasons presented above, this Court should affirm the result below.

Respectfully submitted,

THOMAS D. BARR
DAVID BOIES
MAX R. SHULMAN
FRANCIS P. BARRON
ROBERT B. SILVER
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

PAUL J. CURRAN
MILTON J. SCHUBIN
RANDOLPH S. SHERMAN
IRA S. SACKS
J. CLARK KELSO
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000

WILLIAM F. BAXTER
SHEARMAN & STERLING
4 Embarcadero Center
San Francisco, California 94111

Of Counsel.

Attorneys for Appellee
Texaco Inc.

November 4, 1986

APPENDICES

TABLE OF CONTENTS

	Page
APPENDIX A	
Texas Rule of Civil Procedure 329b	A1
APPENDIX B	
Texas Rule of Civil Procedure 364.....	A3
APPENDIX C	
Excerpt from Minutes, Advisory Committee for the Supreme Court of Texas, Nov. 12-13, 1982, p.293...	A5

APPENDIX A

Rule 329b. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rules 316 and 317) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rules 316 and 317), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rules 316 or 317 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

APPENDIX B

Rule 364. Supersedeas Bond or Deposit

(a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

(c) Land or Property. When the judgment is for the recovery of land or other property, the bond or deposit shall be further conditioned that the appellant shall, in case the judgment is affirmed, pay to the appellee the value of the rent or hire of such property during the appeal, and the bond or deposit shall be in the amount estimated or fixed by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the appellant may supersede the judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by filing a supersedeas bond or making a deposit in the amount to be fixed by the court below, not less than the rents and hire of said real estate; but if the amount of said supersedeas bond or deposit is less than the amount of the money judgment, with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(e) Foreclosure on Personal Property. When the judgment is for the recovery of or foreclosure upon specific personal property, the appellant may supersede the judgment insofar as it decrees the recovery of or foreclosure against said specific personal property or by filing a supersedeas bond or making a deposit in an amount to be fixed by the court below, not less

than the value of said property on the date of rendition of judgment, but if the amount of the supersedeas bond or deposit is less than the amount of the money judgment with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(f) Other Judgment. When the judgment is for other than money or property or foreclosure, the bond or deposit shall be in such amount to be fixed by the said court below as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal, but the court may decline to permit the judgment to be suspended on filing by the plaintiff of a bond or deposit to be fixed by the court in such an amount as will secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper.

(g) Child Custody. When the judgment is one involving the care or custody of a child, the appeal, with or without a supersedeas bond or deposit shall not have the effect of suspending the judgment as to the care or custody of the child, unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) For State or Subdivision. When the judgment is in favor of the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the bond or deposit shall be allowed and its amount fixed within the discretion of the trial court, and the liability of the appellant shall be for the face amount if the appeal is not prosecuted with effect. The discretion of the trial court in fixing the amount shall be subject to review. Provided, that under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the bond or deposit may allow recovery for less than its full face amount.

(i) Certificate of Deposit. If the appellant makes a deposit in lieu of a bond, the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.

APPENDIX C

Excerpt from Minutes, Advisory Committee for the Supreme Court of Texas, Nov. 12-13, 1982, p. 293

This rule has to do with supersedeas bonds, and there's some textual changes, but the only thing of substance [concerns a different subdivision of the Rule].

No. 85-1798

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANT

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

SIMON H. RIFKIND
ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
KENNETH S. GELLER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

January 4, 1987

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
I. THE TEXAS COURTS HAVE AT ALL TIMES BEEN OPEN TO HEAR THE ARGUMENTS TEXACO PRESSES HERE AGAINST THE SUPPOSEDLY IRRATIONAL APPLICATION OF THE LIEN AND BOND PROVISIONS PENDING APPEAL	3
A. The Closed-Courts Argument	3
B. The Uncertainty Argument	5
II. THE SECOND CIRCUIT'S EXPANSION OF THE STATE ACTION CONCEPT IS UNTENABLE, AND THE INJUNCTION ENTERED BELOW IS THEREFORE INDEPENDENTLY BARRED BY § 2283	12
III. THE COURTS BELOW HAD NO POWER TO ISSUE A STAY IN AID OF THE JURISDICTION OF THE COURTS OF TEXAS OR OF THIS COURT	13
IV. THE SECOND CIRCUIT'S DUE PROCESS HOLDING REDUCES TO AN UNTENABLE CLAIM THAT IT IS IRRATIONAL TO REQUIRE *ANY* SECURITY OF A COMPANY AS SOLVENT AS TEXACO	15
CONCLUSION	20
Appendix	1a

TABLE OF AUTHORITIES

Cases PAGE

A-Cos Leasing Corp. v. Riverside Nat'l Bank, 450 S.W.2d 435 (Tex.Civ.App.—Beaumont 1970, writ ref'd n.r.e.) 4

City of Garland v. Louton, 691 S.W.2d 603 (Tex. 1985) 7

Cleveland v. Tufts, 7 S.W. 72 (Tex. 1888)..... 19

County of Washington v. Gunther, 452 U.S. 161 (1981) 20

Dillingham v. Putnam, 109 Tex 1, 14 S.W. 303 (1890).. 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)..... 15

Drake v. Trinity Universal Ins. Co., 600 S.W.2d 768 (1980) 19

Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex.Civ.App.—Dallas 1937, writ dism'd w.o.j.) 4

Hernandez v. Danaher, 405 F.Supp. 757 (N.D. Ill. 1975) 5

Hernandez v. Finley, 471 F.Supp. 516 (N.D. Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)..... 5

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 11

Juidice v. Vail, 430 U.S. 327 (1977).....5, 11

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986).....8, 10

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).... 14

Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982)..... 3, 5

Moore v. Sims, 442 U.S. 415 (1979) 5, 9

PAGE

Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) (Blackmun, Circuit Justice) 14

Ohio Civil Rights Commn. v. Dayton Christian Schools, 106 S.Ct. 2718 (1986) 9

Olympia Equipment v. Western Union, 786 F.2d 794 (7th Cir. 1986) 19

Ortwein v. Schwab, 410 U.S. 656 (1973) 10

Pace v. McEwen, 604 S.W.2d 231 (Tex.Civ.App.—San Antonio 1980, no writ) 8, 14

Scurlock Oil Co. v. Smitwick, No. C-4838 (Tex. S.Ct. Nov. 26, 1986) 12

Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850 (Tex.Civ.App.—Dallas 1983, writ ref'd n.r.e.) 4

Texas State Bd. of Examiners v. Lane, 349 S.W.2d 763 (Tex.Civ.App.—Ft. Worth 1961, no writ) 7

Trainor v. Hernandez, 431 U.S. 434 (1977) 5

Transamerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799 (Tex. 1978) 4

Turcotte v. Alice National Bank, 402 S.W.2d 894 (Tex. 1966) 7

United States v. Kras, 409 U.S. 434 (1973) 10

Weaver v. Bogle, 325 S.W.2d 457 (Tex.Civ.App.—Waco 1959, no writ) 4

Constitutional Provisions

Texas Constitution, Art. I, § 13 10

Statutes

11 U.S.C. § 544 17

PAGE

11 U.S.C. § 547 17

11 U.S.C. § 548 17

28 U.S.C. § 1257 14

28 U.S.C. § 2283 13

42 U.S.C. § 1983 ..... 11, 13

Tex. Civ. Prac. & Rem. Code § 65.013 7

Tex. Govt. Code § 21.001 8

Tex. Govt. Code § 22.002 8

Tex. Govt. Code § 22.221 8

Tex. Govt. Code § 23.101 4

Tex. Govt. Code § 23.102 4

Tex. Govt. Code § 24.011 8

Rules

Tex R. Civ. P. 329b 4

Tex. R. Civ. P. 364 ..... 3, 12

Tex. R. Civ. P. 365 8

Other Authorities

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1798

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANT

INTRODUCTION

Texaco's position, and the Second Circuit's judgment, depend upon four crucial propositions: (i) Pennzoil had no need for security pending appeal; (ii) Texaco would have been gratuitously and irreparably injured by operation of the Texas security provisions; (iii) the Texas courts were powerless to address these security issues; and (iv) federal intervention in this case will not affect the systemic values of comity and federalism because the holdings here apply only to unique circumstances unlikely ever to recur.

These propositions are insupportable. Texaco surreptitiously sought federal relief, without notice to Pennzoil or to the Texas courts, even before the state trial court had entered its judgment. Contrary to Texaco's flat misrepresentation that it "did not seek . . . review of Pennzoil's Judgment" (Texaco Brief

"TB" 10), the Second Circuit recognized that the relief Texaco sought and obtained, "despite [a] lip-service disclaimer, constitute[d] . . . impermissible appellate review of issues . . . already . . . adjudicated by the Texas trial court." (A19). In granting injunctive relief against the Texas security provisions, the district court—contrary to Texaco's assertions—found that Pennzoil *does* need full security. But that court reduced the bond in accord with its own assessment of what it believed Pennzoil's maximum recovery should be after it "reviewed the Texas trial and judgment on the merits." (A47).

Unwilling and unable to defend that sort of merits review here after being rebuffed by the Second Circuit, Texaco is reduced to supporting the Second Circuit's theory that *no* security is necessary because Texaco's assets would be worth enough, on liquidation, to cover the Pennzoil judgment. But once one understands that security is needed independent of the debtor's net worth at the time of the judgment, to assure a creditor's place in line and to ensure collection without burdensome additional proceedings, it becomes plain that demanding full security is entirely reasonable on these facts.

What is crucial to recognize, however, is that the entire issue of how reasonable it is to demand full security should not have been addressed by the federal courts below and need not be reached by this Court. For all of Texaco's arguments against strict application of the Texas security provisions could and should have been presented in the first instance to the Texas courts and then, if necessary, to this Court or a Circuit Justice. Texaco's elaborate (and completely misleading) exegesis of Texas law is beside the point once one recalls the bedrock proposition that *federal* law precludes deliberate bypass of a pending state proceeding unless state law *plainly barred* presentation of the relevant federal claims. Abandoning this settled principle of federalism for Texaco would produce a precedent that could not be contained on any defensible basis, and cannot be justified by any unique aspect of this case.

There is irony in Texaco's relentless appeal to the supposed equities in its favor: not even Texaco can offer a good faith

defense of its original resort to the non-existent appellate jurisdiction of the federal court in White Plains. And the defense Texaco now offers for the extraordinary reprieve it won from the federal courts below cannot withstand principled analysis.[1]

I. THE TEXAS COURTS HAVE AT ALL TIMES BEEN OPEN TO HEAR THE ARGUMENTS TEXACO PRESSES HERE AGAINST THE SUPPOSEDLY IRRATIONAL APPLICATION OF THE LIEN AND BOND PROVISIONS PENDING APPEAL.

It is settled that an issue must be presented in a pending state proceeding "unless it *plainly appears* that this course would not afford adequate protection." *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 435 (1982) (emphasis added, citations omitted). Texaco's excuse for not presenting its claims to the Texas judiciary is the assertion that this core principle of judicial federalism does not apply because Texas has closed its courts, affirmatively denying its own judiciary any role in securing and supervising money judgments pending appeal. (TB 36). This is preposterous.

A. The Closed-Courts Argument.

The centerpiece of Texaco's argument is the fact that the Texas lien and bond provisions do not *themselves* establish a specific hearing procedure to deal with the issue of post-judgment security. (TB 34-35).[2] As a matter of federal law, that is

---

1. Pennzoil will not respond here to the misplaced arguments, made by Texaco's *amici*, which paint a distorted picture of the merits of the Texas tort litigation. Those arguments obviously belong in the courts of Texas, where they are currently being addressed.

2. The bond rule gives appellants *one* way to suspend a judgment but, far from instructing courts that any *other* means of staying enforcement is foreclosed, the rule *itself* directs those courts to consider whether a stay without a full bond is "otherwise provided by law." Rule 364(a). Texaco would read these words out of the rule by quoting a single, uninformative passage from the minutes of a non-binding Texas advisory committee, a body with no power to promulgate rules. (TB 42 n.87). In essence, Texaco contends that, in adding the prefatory language, the Texas Supreme Court meant to enact a nullity.

wholly immaterial. No special hearing is needed, for these provisions come into play only upon entry of a trial court judgment, and it is indisputable that, in every such instance, the trial court that entered the judgment remains available to adjudicate all related problems. For thirty days after the entry of judgment or the denial of a motion for new trial, a Texas trial court retains "plenary power" over the entire case,[3] including jurisdiction over collateral matters relating to superseding[4] or enforcing the judgment.[5] "Under the general supervisory powers over their process," Texas courts "have the power temporarily to stay execution on judgments by them rendered when necessary to accomplish the ends of justice."[6] Prompt action from the trial court is assured, since a judgment debtor pressing constitutional grounds for an unsecured stay may invoke the priority treatment guaranteed under Texas law to constitutional, injunctive and emergency claims.[7] Indeed, in this case the trial court acted upon entry of judgment to suspend the judgment against Texaco without either a bond or liens. (A127-28 ¶ 7). That stay in turn gave Texaco *fully 3-1/2 months* in which to present its case for an unsecured stay to last for the duration of the appeal.

---

3. Tex.R.Civ.P. 329b(d), (e) & (g) ; *see Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978). The authorities Texaco cites as contrary (TB 36 n.72) deal not with the issue of the court's post-judgment jurisdiction, but with the irrelevant issue of a party's pre-judgment freedom to amend its trial pleadings.

4. *See Southwestern States General Corp. v. McKenzie*, 658 S.W.2d 850, 852 (Tex.Civ.App.— Dallas 1983, writ ref'd n.r.e.) (trial court has power to rule on alternate security to supersede a money judgment even if appellate court has already acquired jurisdiction).

5. *See A-Cos Leasing Corp. v. Riverside Nat'l Bank*, 450 S.W.2d 435, 438 (Tex.Civ.App.—Beaumont 1970, writ ref'd n.r.e.).

6. *Fairbanks, Morse & Co. v. Carsey*, 109 S.W.2d 985, 990 (Tex.Civ. App.—Dallas 1937, writ dism'd w.o.j.) (citation omitted) (staying money judgment without security); *Weaver v. Bogle*, 325 S.W.2d 457 (Tex.Civ.App.—Waco 1959, no writ) (staying money judgment beyond termination of trial court's plenary jurisdiction).

7. *See* Tex.Govt. Code §§ 23.101(a)(1) & (b), 23.102(1) & (2).

An "*opportunity* to present [one's] federal claims in the state proceedings" is all that the law requires. *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (original emphasis). That opportunity plainly existed here. All Texaco had to do was walk back into the Texas trial court—which had already arranged an unsecured stay—and present its constitutional claim. Indeed, the district court expressly found that the Texas trial "court has the power and . . . the duty to consider reduction of the bond on federal Constitutional grounds" (A104). And the Second Circuit agreed: "Texaco could mount an attack in the Texas courts on the [full security requirement], by motion and mandamus, on the ground that it is unconstitutional as applied in this case." (A10).[8]

B. The Uncertainty Argument.

Unable to show that "state procedural law barred presentation" of its federal claim, *Moore v. Sims*, 442 U.S. 415, 432 (1979); *id.* at 430 & nn.12, 13, Texaco would reverse the burden of proof established by this Court[9] by retreating to the argument that "any procedural route for making a constitutional challenge in the state courts would (at best) have had to be used in novel, unintended and wholly uncertain ways." (TB 2). With the clock of financial doom ticking, Texaco had no

---

8. Texaco errs in relying on *Trainor v. Hernandez*, 431 U.S. 434 (1977). (TB 25 n.46, 34-35). There, it made sense to look exclusively to the procedures available in the statutory attachment proceeding itself—and not to the plenary jurisdiction of the trial court—since Illinois had bifurcated the debt collection process: a creditor could automatically obtain a writ of attachment in an independent statutory proceeding *before even filing his complaint against the debtor. Hernandez v. Danaher*, 405 F.Supp. 757, 761 (N.D.Ill. 1975). Once a writ of attachment issued, Illinois law spelled out particular ways in which the debtor could challenge the writ. Those special procedures barred the interposition of federal constitutional challenges. *Hernandez v. Finley*, 471 F.Supp. 516, 519-520 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979).

9. *See Middlesex Ethics Comm. v. Garden State Bar Assn., supra*, 457 U.S. at 435 ("unless it *plainly appears*" that pending state proceedings "would *not* afford adequate protection" the state defendant's federal claim must be presented there) (emphasis added).

choice but to flee to a federal haven in White Plains. That paints a dramatic picture that is both inaccurate and wholly irrelevant. State remedies might be faulted as inadequate if it is uncertain whether a federal plaintiff could even *find* a state court with jurisdiction to adjudicate his federal claim in a timely manner. But when the federal plaintiff is already a party in a state court with plenary jurisdiction, uncertainty about how that court would *respond* to a federal claim against immediate enforcement of its judgment cannot warrant federal intervention.[10] If there *were* real questions about how the courts of Texas would respond, those questions obviously should have been raised in those courts, where Texaco could have invoked both the state constitution and federal due process at any point during the 3-1/2 months that were available to Texaco before any enforcement action of any kind could occur.

The Second Circuit, the district court, and Texaco all treat this extended period as irrelevant on the remarkable ground that the financial community had already panicked in response to the verdict itself (A40, A99 ¶ 76, A106 ¶ 104); that it feared what the Texas courts might do *next* in construing or even cutting short the 3-1/2 month standstill (A10, A89-90, A97; *see* TB 5 & n.10); and that it worried about what would happen in Texas the moment that standstill *expired* (A7-8, A10, A40, A88)—with the result that only *instant* relief could rescue Texaco from financial doom. (*See* TB 33). Procedural uncertainties that could not be decisively removed "*within a matter of days or even hours*" must accordingly be deemed fatal. (TB 37; original emphasis). That is a thinly veiled plea for an immediate federal judicial takeover whenever what the district

---

10. Therefore, this case bears no resemblance to cases about federal intervention in specialized tax or debt collection processes that are not part of any plenary judicial proceeding. (TB 34-35 & n.70). The affront to a state's courts, and the incentive for state court defendants to conjure uncertainties in how those courts might proceed, are far greater when such defendants are permitted to bypass courts in which they are already litigating, on the basis of alleged doubts about how those courts would treat federal challenges to their rules or procedures.

court called the "volatile and sensitive . . . emotions and attitudes" of financiers (A111) will be satisfied by nothing less. Nothing could more clearly demonstrate the danger of entertaining Texaco's kinds of "uncertainties" as grounds for bypassing a pending state proceeding.

In truth, however, there was nothing in the least novel or uncertain about the paths open to Texaco. Texas law provides a formidable array of procedures and remedies for timely adjudication of Texaco's constitutional claims, state and federal, against application of the lien and bond provisions. Among those procedures is the obvious route of simply asking the trial court to stay its judgment without security, as an exercise of its supervisory power over that judgment, in order to protect Texaco's rights. *See* pp. 4-5 and nn.3-7, *supra*.[11] But the Texas remedial array also gave Texaco the opportunity:

• to ask the Texas trial court for an injunction against enforcement of its own judgment, pursuant to the Stay of Judgment Statute, § 65.013;[12]

---

11. Typical of Texaco's "uncertainties" is its claim that the Texas courts might have wielded the Declaratory Judgment Act to bar resolution of any challenge based on Texaco's rights without the formal intervention of the Texas Attorney General. (TB 36 n.72) But that statute is irrelevant on its face, since Texaco's avenue of relief is by ancillary motion or mandamus, not by an original declaratory action. And the Texas Supreme Court has specifically held that, even in declaratory actions, formal intervention by the attorney general is *not* required. *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985).

12. Tex.Civ.Prac. & Rem.Code §65.013 provides that: "An injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against and as much as will cover the costs." Texaco purports to fear that the state courts would have required it to bring a separate, original action if it "petition[ed]" for relief under this statute. (TB 42). But temporary writs of the sort authorized by § 65.013 are routinely issued by trial courts ancillary to the main cause of action when "necessary to preserve the status quo pending the final adjudication of the rights of the parties," *Turcotte v. Alice National Bank*, 402 S.W.2d 894, 896 (Tex. 1966). *See also Texas State Bd. of Examiners v. Lane*, 349 S.W.2d 763, 764 (Tex.Civ.App.—Ft.Worth 1961, no writ).

• to ask the trial court for a writ of mandamus compelling the court clerk to suspend the judgment without a full bond or liens, on the ground that application of the lien and bond provisions in this case would violate both the state "open courts" guarantee and federal due process;[13]

• to ask the Texas Court of Appeals or the Texas Supreme Court to enjoin execution of the judgment in order to preserve jurisdiction over Texaco's appeal, on the ground that, without an unsecured stay, that appeal would become "meaningless," *Pace v. McEwen*, 604 S.W.2d 231, 232-33 (Tex.Civ.App.—San Antonio 1980, no writ) (appellate courts may enjoin judgments to prevent appeals ~~from becoming~~ "meaningless" even if the appellant cannot post a supersedeas bond);[14]

• to seek reduction of the supersedeas bond from the Texas Court of Appeals, pursuant to Rule 365(b), which expressly states that its provision for review and reduction of *all* excessive bonds applies "[i]n like manner" to "any . . . bond or deposit under Rule 364."[15]

This Court need not be distracted by the far-fetched doubts Texaco says it has about where each of these procedural paths

---

13. Tex.Govt. Code § 24.011. *See LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), discussed *infra* n.19.

14. Texaco wholly ignores each appellate court's broad statutory power to issue writs in aid of its own jurisdiction. *See* Tex.Govt.Code §§ 21.001(a), 22.002(a), 22.221(a). Texaco would distinguish *Pace* as limited to injunctions against the transfer of *property in satisfaction of a money judgment*. (TB 41). But that distinction lacks any basis in the *Pace* opinion's discussion of statutory power to preserve jurisdiction. In any event, the ~~injunction~~ Texaco obtained here from the federal courts, which it could have sought from the Texas courts, enjoined Pennzoil from taking liens against Texaco's *property in satisfaction of a money judgment*.

15. Texaco quotes the Second Circuit Reply Brief of the Texas Attorney General in an attempt to conjure "uncertainty" over the availability of such Rule 365 relief. (TB 40 n.81). The very next line in the Attorney General's brief states: "Once again, however, Texaco's denigration of its potential state judicial relief is based on illusion and incomplete analysis of the governing authorities. Its discussion could give a very misleading impression of Texas law." (Tex.Rep.Br. at 10).

might have led. It was in the Texas courts, where Texaco was already litigating, that any such doubts should have been tested.[16] Recall that Texaco had 3-½ months under Paragraph 7—through late March 1986—to pursue those avenues and raise any questions as to their efficacy. It is therefore ridiculous for Texaco to claim that, when it "finally moved for emergency federal relief" in early December 1985, "all state avenues [were] impeded and time [was] running out" (TB 2). How can Texaco have found these routes "impeded" without taking a single step along any of them? The Second Circuit offers no better explanation than its surmise that Texas judges would either deem the state and federal Constitutions irrelevant to the rules requiring full security (A36, A37) or would deliberately evade the issue by delaying any resolution of Texaco's challenge until their jurisdiction expired (A36). Thus federal intrusion was illegitimately predicated on fear that a state court of plenary jurisdiction might deny its authority to "construe its own statutory mandate in the light of federal constitutional principles" *Ohio Civil Rights Commn. v. Dayton Christian Schools*, 106 S.Ct. 2718, 2724 (1986), either overtly or by deliberate delay.[17]

Only such unfounded fear and suspicion can account for the melodramatic tale Texaco weaves of what might have befallen it had it dared to enter the supposed labyrinth of Texas civil procedure—where corridors lead nowhere and doors are slammed in one's face.[18] This colorful saga is the most specula-

---

16. *Cf. Moore v. Sims*, 442 U.S. 415, 429-30 (1979) (*Younger* abstention creates "opportunity for . . . constructions [of state law] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests").

17. Texaco's supposed fear of dilatory behavior by the Texas judiciary rests on nothing beyond the trial court's eminently reasonable reminder to Texaco that it must comply with the civil rules and seek judicial hearing and relief by filing properly noticed motions rather than by writing letters to the court. (TB 6-7).

18. Indeed, even if the Texas courts would deem themselves "powerless to give any relief without Pennzoil's consent" (TB 5), Texaco cannot explain its premise (TB 38 n.74) that those same courts would stub-

tive form of fiction. In constructing its hypothetical maze, Texaco not only *invents* obstacles where none exist, it also studiously *ignores* the obstacle-clearing "open courts" guarantee of the Texas Constitution, Art. I, § 13, which for a century has made Texas civil practice uniquely hospitable to the very kinds of claims Texaco presses here.[19]

Indeed, such cases as *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), *supra* n.19, make plain that financial barriers to judicial access which the Fourteenth Amendment would have left intact have fallen swiftly at the mere mention of the "open courts" provision of the Texas Constitution, making resort to federal due process claims quite unnecessary.[20] *Compare LeCroy* (invalidating increase in district court filing fee even as applied to non-indigents), *with United States v. Kras*, 409 U.S. 434 (1973) (upholding bankruptcy court filing fee, even as applied to indigents), *and compare Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890) (invalidating supersedeas bond as prerequisite to appeal if appellant cannot afford it), *with Ortwein v. Schwab*, 410 U.S. 656 (1973) (upholding filing fee, as applied to indigent, as prerequisite to appellate review of welfare payment reduction).

---

bornly refuse to accept the consent to more flexible security arrangements that Pennzoil in fact gave through its Fed.R.Civ.P. 62 stipulation (A129).

19. *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986) (*see* Pennzoil Brief "PB" 27 n.17), which Texaco refuses to address, is illustrative. There, a Texas trial court clerk refused to accept a civil complaint for filing until plaintiff tendered an extra $75—the newly effective increase in filing fees enacted as a hard and fast rule by the legislature. Plaintiff invoked the "open courts" guarantee to challenge the increase and sought a writ of mandamus from the trial court. *Within a week* of conducting a hearing on that challenge, the trial court judge declared the fee increase unconstitutional under the "open courts" provision and issued a writ compelling the clerk to file the complaint. *Id.* at 336-37. The Texas Supreme Court affirmed. *Id.* Texaco obviously could have used here the very avenue used so succesfully in *LeCroy*.

20. *See LeCroy*, 713 S.W.2d at 338 ("state courts [do] not hesitate[] to look to their own constitutions to protect individual rights") (relying on Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977)).

Even if one might otherwise imagine overruling such cases as *Kras* and *Ortwein* at the behest of a litigant that is anything but indigent or insolvent, it would unjustifiably denigrate the competence of the Texas judiciary to affirm Texaco's right to leapfrog the Texas courts, and to bypass the unusually generous Texas Constitution, in order that Texaco might blaze that federal trail without first exhausting state remedies.[21]

The only real uncertainty confronting Texaco was whether the Texas courts would have been *persuaded* by its argument that it is entitled to an unsecured stay of judgment. The Second Circuit voiced just that concern, suggesting that the Texas judiciary might have reached what the court below deemed the wrong conclusion by "fix[ing] security in a[n] [un]reasonable amount." (A37-38). But it is settled law that a federal court may not displace state courts because it believes they will err on the merits. Self-serving forecasts of the futility of raising federal claims in state courts cannot suffice to avoid federal abstention. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610 (1975). And surely Pennzoil, deeming Texaco's federal claim untenable, cannot be asked to predict that the Texas courts would mistakenly accept it. It follows that the *Younger* doctrine clearly required abstention even if Texaco's federal complaint were otherwise proper under § 1983. But § 1983 is in fact unavailable, as the next section shows.

---

21. Texaco argues that the State of Texas, by abandoning the issue of security to the judicially unsupervised hands of a private party, has foresworn the sort of sovereign interest this Court deemed worthy of comity in *Juidice v. Vail*, 430 U.S. 327 (1977) (TB 9-10, 25, 28). As demonstrated above, there has been no such abdication of public power. The state interest in enforcing the results of trials is no less than the state interest in conducting them. In arguing that *Younger* forbids federal injunctions against state court proceedings, but permits injunctions against the process by which judgments, the product of those proceedings, are carried out, Texaco drains *Younger* of much of its meaning.

II. THE SECOND CIRCUIT'S EXPANSION OF THE STATE ACTION CONCEPT IS UNTENABLE, AND THE INJUNCTION ENTERED BELOW IS THEREFORE INDEPENDENTLY BARRED BY § 2283.

Texaco describes the Second Circuit's state action holding as limited to cases of "*unsupervised* control of *government* power to appropriate *disputed* property" (TB 21 n.39) (original emphasis). This formula may accurately describe the facts of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and this Court's other *ex parte*, pre-judgment attachment cases, but it does not apply here. In this case there has been no abdication to Pennzoil of unilateral power to dispose of Texaco's interests. The government of Texas, through its judicial branch, has resolved the dispute between Pennzoil and Texaco by means of a 4-½ month trial, resulting in an enforceable judgment that is "final for the purposes of issue and claim preclusion despite the taking of an appeal" *Scurlock Oil Co. v. Smithwick*, No. C-4838, slip op. at 10 (Tex.S.Ct. Nov. 26, 1986) (citation omitted). Pennzoil's position is simply that of a winning private litigant seeking security for the judgment it has won. If Pennzoil is a state actor on the facts of this case, then so is every state court litigant with a valid judgment to enforce.[22]

Granted, the State of Texas has given one party unilateral control over execution of the judgment pending appeal, *but that party is Texaco*, which under Rule 364 may suspend execution by posting full security. Texas law further permits Texaco to request suspension without full security. *See* Part I, *supra*. But this gives Pennzoil nothing beyond the ability under

22. Texaco concedes that, after appeals are exhausted, a private party's invocation of a state's judgment enforcement mechanisms is not state action, because it "cannot be characterized as unsupervised" and because the property in question is "no longer in dispute" (TB 21). Since Texas law makes Pennzoil's victory after full trial enforceable and claim-preclusive pending appeal, Texaco's imagined distinction between pre-appeal and post-appeal "judicial supervision" is an insupportable *ipse dixit*.

state law to *resist* Texaco's pleas for an unsecured stay. As Texaco itself concedes, "[w]here there is a process by which state courts exercise discretion . . . suing the private state court litigant will not provide a § 1983 entree into the federal courts." (TB 31).[23] But for the injunction entered below, which bars *all* resort to the Texas courts on the issue of security (*see* PB 17 n.7), that process of judicial discretion would be in operation today. Section 1983 was therefore unavailable to Texaco. And, as the next section shows, the relief awarded was unavailable to the courts that issued it.

III. THE COURTS BELOW HAD NO POWER TO ISSUE A STAY IN AID OF THE JURISDICTION OF THE COURTS OF TEXAS OR OF THIS COURT.

The original jurisdiction of the lower federal courts does not encompass the quintessentially appellate power to stay state court judgments in order to facilitate meaningful appeals in and from the state court system. Texaco's only reply is to say that what it obtained from the courts below was *not* a stay of judgment, designed to aid the jurisdiction of any appellate court, state or federal; it was an injunction against the challenged lien and bond provisions, issued to preserve the status quo and thereby to protect Texaco's right to "a meaningful appeal" (TB 47).

Texaco is playing word games. When an appellate court enjoins enforcement of a trial court judgment pending appeal, in order to preserve the status quo and thereby avert the possibility that "any opinion [it] might subsequently render as to the [challenged] judgment would be meaningless," it is

---

23. Texaco strives to downplay the impact of the Second Circuit's state action holding on § 2283, noting that it could just as easily have sued state enforcement officials. (TB 21-22 & n. 40). Yet Texaco concedes that such a suit would be premature before the relevant discretion had been exercised—and barred, except on direct review, thereafter. (TB 31 n.60). Moreover, for this Court to uphold the judgment below, it would have to endorse a radical expansion of the state action concept, and *that* holding could not in the future be confined to the context of the Anti-Injunction Act.

acting "to protect its jurisdiction." *Pace v. McEwen*, 604 S.W.2d at 232-33. That is precisely what the courts below did in this case. But they have no appellate jurisdiction to protect. Nor does casting the injunction as one against the security provisions as applied to the Pennzoil judgment (TB 17) change the nature of the remedial power usurped by the courts below. The security provisions affect Texaco only insofar as they impede the stay *pendente lite* that Texaco wished to obtain without full security. To enjoin those provisions as applied is to grant the stay sought.[24]

The courts below acted in no less an appellate capacity than this Court would have if Texaco had proceeded with its due process challenge straight up through the Texas courts and sought a stay from this Court.[25] The difference is that *this Court would have required exhaustion, while the courts below did not.* And Texaco offers not a whisper to rebut the reasons Pennzoil has given (PB 39-41 & nn. 37-38) for concluding that the original jurisdiction Congress conferred on federal district

---

24. Texaco's Third Cause of Action demanded relief to preserve the pre-judgment status quo so as to protect Texaco's ultimate right to seek certiorari (Reply Brief Appendix "RBA" 4a; *see* PB 36 & n.32), and its Sixth Cause of Action sought a stay of the security provisions and of the judgment itself to permit meaningful pursuit of state appeals. (RBA 7a, 8a). The Second Circuit endorsed federal interference with state proceedings as necessary to facilitate the operation of the appellate process (A14), and Texaco defends the result below on the same grounds. (TB 17 n.32, 26-27 & n.52, 49).

25. Texaco is confused if it supposes that a stay is appellate in character *only* if it entails substantive review of the merits of the underlying judgment. (*See* TB 47-48 & nn.100, 101). If Texaco were rebuffed by delays in pursuing its state judicial remedies, no such merits review would be required to support a stay by this Court, or by a Circuit Justice, ancillary to a mandatory appeal under 28 U.S.C. § 1257(2) from a decision—including "a final decision" by "delay," *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1328-29 (1975) (Blackmun, Circuit Justice)—upholding the Texas security provisions against due process attack. Yet such a stay would plainly involve exercise of an appellate function, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803) (appellate power either "revises and corrects the proceedings in a cause already instituted," or "enable[s] the court to exercise its appellate jurisdiction"). Exactly the same function was performed by the district court in this case.

courts should not be stretched, without a hint of congressional intent to produce such a remedy, into a form of civil habeas corpus without exhaustion.[26]

IV. THE SECOND CIRCUIT'S DUE PROCESS HOLDING REDUCES TO AN UNTENABLE CLAIM THAT IT IS IRRATIONAL TO REQUIRE *ANY* SECURITY OF A COMPANY AS SOLVENT AS TEXACO.

Even Texaco freely concedes that due process is not even implicated unless full security is *both* unnecessary to protect Pennzoil *and* impossible for Texaco to satisfy without incurring irreparable harm. (TB 16; *see id.* 9, 11, 12-13 & n.23, 17). Texaco's strange concept of security cannot be defended. And its notion of impossibility cannot be limited to the circumstances of this case.

Texaco purports to prove that no security is needed by alluding to a supposed lower court finding and to a supposed concession by Pennzoil. There was no such finding and no such concession. Texaco persists in disregarding what the district court actually concluded:

> This Court is concerned lest other creditors of Texaco . . . seek[ ] to perfect security interests higher than that which would be available to Pennzoil. This would be unfair to Pennzoil and it would be contrary to the public interest . . . Accordingly, the Court believes that this [stay] must be secured by assets or obligations at least equal in value to what this Court regards as the maximum

---

26. Texaco's only defense for its deliberate bypass of the Texas courts is the claim that it was compelled to skip over them, because Texas supposedly closed its own courts to consideration of requests like Texaco's for an unsecured stay pending appeal. Since that supposition is baseless, *see* Part I, *supra*, Texaco is indistinguishable from any other party seeking appellate relief from a federal district court by the expedient of withholding, from the state courts in which the party is then litigating and which remain open to hear the relevant federal arguments, "the first opportunity to consider a state statute or rule in light of federal constitutional arguments." *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n.16 (1983).

> amount of compensatory damages which are likely to be awarded to Pennzoil . . .

(A77).[27] The district court thus recognized that the point of requiring even solvent judgment debtors to post security is to protect the judgment creditor's place in line vis-a-vis other creditors.[28]

Given the purpose of securing a judgment, the district court's review of the underlying adjudication in Pennzoil's favor (A62-66, A77-78) was an indispensable part of any effort to accommodate the parties' interests pending appeal: determining the optimal amount of security needed to assure a judgment creditor's deserved place in line requires evaluating the maximum amount of damages that should have been awarded, discounted by the probability that the judgment might be reversed.[29] Any such determination is inextricably intertwined with the merits of the judgment.[30]

The Second Circuit recognized this (A47-48), and upheld the injunction by substituting a new rationale -- that no security at all was required,[31] because of Pennzoil's supposed "conces-

27. This conclusion, quoted from the district court's opinion, cannot be impeached by Texaco's selective excerpts from the "Supplemental Findings of Fact," since those findings were expressly subordinated by the district court to its written opinion (A78, A79).

28. It is therefore immaterial whether the Second Circuit is correct in its assertion that there is no reason to fear that Texaco will "seek, to encumber" its assets (A47): the concern is that Texaco's numerous other creditors, not Texaco itself, will eventually be able to bump Pennzoil from its place in line if the Texas judgment is not secured. Texaco's own description of its creditors' adverse reaction to the jury's verdict (TB 5) is therefore an argument *for*, not against, full security for Pennzoil.

29. The district court evaluated the Texas judgment in just these terms, and required Texaco to post a bond of $1 billion. (A77-78). The Second Circuit quite properly ruled this evaluation to be beyond the jurisdiction of the lower federal courts (A47).

30. Pennzoil does not oppose this sort of fine-tuning—provided it is undertaken by the state judiciary as part of the appellate process.

31. Nevertheless, the Second Circuit declined to vacate the bond set by the district court, evidently because it had already been posted by Texaco. (A47-48).

sion" that Texaco's liquidation proceeds would exceed all of its liabilities, including the judgment. (A45-46).[32]

This peculiar understanding of security ignores the fact that it is routine, and neither unusual nor irrational, to deem full security necessary even when the judgment debtor's estimated net worth is more than ample to satisfy the judgment at issue. The belief that assets would probably exceed liabilities upon liquidation in no way shows security to be unnecessary. Indeed, if a creditor were entitled to security only when the debtor's debts exceeded its assets, commercial security arrangements could rarely be worked out, since the debtor in that situation would by definition be insolvent, and the supposed security interest would be voidable as a mere preference if bankruptcy soon followed. *See* 11 U.S.C. § 547(b). By the same token, if a bond were justified as security for a judgment only when a judgment debtor lacked assets sufficient to meet its obligations, few judgment debtors would find it possible to post valid bonds, since such undertakings by insolvent debtors would be suspect as either voidable preferences, *see id.* § 547(d), or fraudulent conveyances, *see id.*, §§ 544(b), 548. The criterion of need postulated by Texaco and the Second Circuit thus makes no sense.

Unsurprisingly, therefore, *no* jurisdiction, state or federal, conditions the requirement of security pending appeal on a demonstration that enforcing the judgment would overwhelm the judgment debtor's net worth. The largest corporations must routinely post bonds or other security even for the smallest judgments. This is because the purpose of security, be

---

32. Texaco's own complaint stated the company's market value as considerably less than the size of the Texas judgment. (RBA 2a). The district court likewise assessed Texaco's net worth at less than the amount of the judgment. (A60-61). The only thing Pennzoil has "conceded"—its belief that those estimates are too low, and that as of last July, Texaco could satisfy this judgment without undermining its "economic viability, given its vast resources" (TB 8 n.13)—shows only that Texaco exaggerates the economic catastrophe that would befall it if it had to provide full security, not that the Pennzoil judgment need not be fully secured.

it a commercial lien or a judgment bond, is not just to deal with the rare event of a bankruptcy, but to give the creditor assurance that, regardless of subsequent economic developments, it will be able to collect its full debt automatically, without going through a cumbersome collection action, and to assure the creditor that no other creditor can perfect a prior lien—important safeguards, as the district court recognized, even when the currently estimated liquidiation value is thought to exceed all current liabilities.

A requirement of full security in this case thus cannot be deemed unnecessary, and therefore is not irrational in the sense of imposing gratuitous harm on Texaco. Accordingly, Texaco's due process argument fails on its own terms. (*See* TB 16, 17). Moreover, Texaco's insupportable approach to security imposes no meaningful limits on federal intervention. If security is unnecessary and irrational here because of the judgment debtor's solvency, then security is equally unnecessary—and requiring it would be equally unconstitutional—whenever the judgment debtor has assets estimated to exceed its aggregate debts, including the adverse judgment.

Nor does Texaco's assertion that the full security requirement is impossible to meet in this case supply a limiting principle for its due process analysis. Texaco has been unable to deny that many trial losers with assets adequate to satisfy the judgments against them may nevertheless, like Texaco, find it impossible to post a sufficient bond, especially if their assets are illiquid. (*See* PB 34). And so long as enforcement of the judgment pending appeal (or liquidation of assets in order to post the required bond) would cause those judgment debtors harm not fully reversible later, those debtors, like Texaco, could allege the destruction of their appeal rights and their consequent constitutional entitlement to an affordable stay of execution.

In any event, the economic harms that would befall Texaco if full security were demanded are neither as drastic nor as irreversible as it assumes. The district court found that Texaco's fanciful vision of its own economic apocalypse does not

comport with the reality of contemporary bankruptcy.[33] And, in dismissing fears that a full bond as security for an appeal would "catapult the corporate family into bankruptcy," Judge Easterbrook correctly observed that "there is no reason to treat bankruptcy as a bogeyman, as a fate worse than death . . . . [T]he [Second Circuit's] alarums in *Texaco, Inc. v. Pennzoil Co.*, which equated a Chapter 11 filing with the imminent dismissal of 55,000 employees and the destruction of the valuable assets of a firm[,] are unjustified. Firms in reorganization go on as before . . . ." *Olympia Equipment v. Western Union*, 786 F.2d 794, 802-03 (7th Cir. 1986) (concurring opinion).[34] Moreover, if the Texas judgment were executed pending appeal, Texaco would be "entitled, upon the reversal of the judgment, to be restored to the position [it] occupied before [it] complied with the requirements of the bond and judgment," including consequential damages, costs, and interest. *Cleveland v. Tufts*, 7 S.W. 72, 75 (Tex. 1888); *reaffirmed, Drake v. Trinity Universal Ins. Co.*, 600 S.W.2d 768, 771 (1980).

To whatever extent Texaco could not be restored to its pre-enforcement state, that risk is unavoidable whenever the security needed to protect the judgment creditor is beyond what the judgment debtor can afford. It bears repeating that Texaco has conceded that, no matter how great the irreparable harm, "the Due Process Clause comes into play when—and only when"—the infliction of that harm is wholly gratuitous because there is no need for security. (TB 16). Given the concession that the Constitution allows a state to impose the risk of interim irreversible injury on trial losers whenever necessary to secure trial winners (TB 16-17), Texaco's plea to be freed of those risks in this case founders with the defeat of its claim that no security is needed.

---

33. "A number of corporations, both large and small, have recently found that Congress has created a rather pleasant and profitable harbor of refuge in the bankruptcy court." (A61).

34. Writing for the majority in *Olympia*, Judge Posner ruled that avoiding the transaction costs of a possible bankruptcy may justify accepting "alternative security to a supersedeas bond that the defendant apparently cannot post," so long as that security provides only "slightly inferior protection of the plaintiff's interest." 786 F.2d at 799.

CONCLUSION

The holdings in Texaco's favor cannot be reconciled with settled principles of federal jurisdiction or of due process. Nor can they "be treated like a restricted railroad ticket, good for this day and train only." *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (citation omitted). The judgment below should therefore be reversed.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

JOSEPH D. JAMAIL
JAMAIL & KOLIUS
3300 One Allen Center
Houston, Texas 77002

HARRY M. REASONER
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002

SIMON H. RIFKIND
ARTHUR L. LIMAN
MARK A. BELNICK
PAUL, WEISS, RIFKIND
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154

JOHN L. JEFFERS
G. IRVIN TERRELL
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

PAUL M. BATOR
DOUGLAS A. POE
KENNETH S. GELLER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

W. JAMES KRONZER
1001 Texas, Suite 1030
Houston, Texas 77002

January 4, 1987

APPENDIX

Appendix

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640 (CLB)

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

AMENDED COMPLAINT

Plaintiff Texaco Inc. ("Texaco"), upon knowledge as to itself and otherwise upon information and belief, avers:

* * *

5. As set forth below, although the Constitution and laws of Texas entitle Texaco to appeal as of right from the Judgment, the Texas Rules of Civil Procedure, on their face, require Texaco to post a supersedeas bond in the amount of the entire Judgment, plus interest and costs, in order to secure a stay of execution of the Judgment pending appeal. Further, Texas law permits Pennzoil, as judgment creditor, to place liens upon Texaco's property within the State of Texas immediately upon entry of the Judgment.

6. As set forth below, application of these provisions of Texas procedural law (hereinafter the "supersedeas and lien provisions") will destroy Texaco as a going concern, thus insulating the Judgment and the *Pennzoil* rule from review in the Texas appellate courts or, if necessary, in the Supreme Court of the United States.

7. As set forth below, application of the supersedeas and lien provisions will effectively foreclose appellate review of the

Judgment and the *Pennzoil* rule and will render irremediable the unlawful effects thereof under the Commerce, Supremacy and Full Faith and Credit Clauses of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will violate Texaco's rights under 28 U.S.C. § 1257(3).

8. In Paragraph 7 of the Judgment, the Texas Court added certain provisions "to preserve the status quo of this proceeding during the pendency of this matter before this Court . . ." Texaco is currently seeking certain clarification and modification of the Judgment in respect of those provisions.

9. When the jurisdiction of the Texas Court terminates, or if the provisions of Paragraph 7 of the Judgment are earlier modified or vacated without Texaco's affirmative consent, Pennzoil will be able to take advantage of the supersedeas and lien provisions described above unless enjoined by this Court.

10. Application of the supersedeas and lien provisions will cause immediate and irreparable harm to Texaco, its shareholders, employees and creditors, including Pennzoil, and the many communities which Texaco serves. Moreover, the uncertainty as to what will happen when the provisions of Paragraph 7 of the Judgment expire or are otherwise vacated or modified threatens Texaco's present ability to obtain the financing required to run and preserve its business pending final resolution of the action. Accordingly, this Complaint seeks temporary, preliminary and permanent injunctive relief restraining defendant herein from enforcing the supersedeas and lien provisions against Texaco other than as allowed by this Court until Texaco has exhausted its rights to review on appeal or certiorari and this action has been finally resolved.

* * *

46. The Judgment entered by the Texas Court is by several orders of magnitude the largest civil judgment ever entered in the history of the United States. It substantially exceeds Texaco's market value, which was approximately $7.4 billion as of December 6, 1985. If upheld on appeal, the Judgment would eliminate all of Texaco's shareholder's equity, representing the retained earnings of the company over its 83 year history.

* * *

FIRST CAUSE OF ACTION

(Commerce Clause)

64. Texaco realleges the averments of Paragraphs 1 through 63 above as if fully set forth herein.

65. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the United States Supreme Court held that state action inhibiting initiation of interstate tender offers impermissibly burdened interstate commerce and thereby violated the Commerce Clause.

66. By deterring the making of a competing tender offer where the target and a given bidder have conducted any substantial negotiations, the Judgment and the *Pennzoil* rule place a substantial, direct, adverse and undue burden upon interstate commerce.

67. Application of the supersedeas and lien provisions to prevent appellate review of the Judgment and the *Pennzoil* rule will render this impermissible burden upon interstate commerce permanent and irremediable, in violation of the Commerce Clause.

SECOND CAUSE OF ACTION

(Supremacy Clause—Williams Act)

68. Plaintiff realleges the averments of Paragraphs 1 through 67 above as if fully set forth herein.

69. By deterring the making of competing tender offers in the manner permitted and encouraged by the Williams Act, the Judgment and the *Pennzoil* rule contravene paramount federal laws and impair and frustrate paramount federal interests in preserving competition and maximizing investment values. In addition, by deterring competing bids, the Judgment and the *Pennzoil* rule confer a substantial tactical advantage upon initial offerors over targets, in contravention of Williams Act policies favoring a "neutral" balance between target and offeror.

70. By virtue of their direct conflict with the Williams Act and its policies, the Judgment and the *Pennzoil* rule are rendered void and of no legal effect under the Supremacy Clause.

71. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule will render permanent and irremediable their conflict with and disruption of the federal regulatory scheme established by the Williams Act.

72. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule is therefore void and of no legal effect under the Williams Act and the Supremacy Clause.

THIRD CAUSE OF ACTION

(Supremacy Clause—28 U.S.C. § 1257)

73. Texaco realleges the averments of paragraphs 1 through 72 above as if fully set forth herein.

74. Under 28 U.S.C. § 1257, a party to state court litigation is entitled to seek review by the Supreme Court of the United States by writ of certiorari taken from "final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right, privilege or immunity is . . . claimed under the Constitution, . . . or statutes of . . . the United States".

75. By preventing Texaco from taking an appeal to the Texas Court of Appeals and State Supreme Court, in which review is otherwise available as of right, application of the supersedeas and lien provisions will effectively prevent Texaco from exercising its federally created right to petition for certiorari under 28 U.S.C. § 1257, thereby precluding any federal review of the Judgment and of the *Pennzoil* rule.

76. Application of the supersedeas and lien provisions is therefore void and of no effect under the Supremacy Clause.

FOURTH CAUSE OF ACTION

(Supremacy Clause—Rule 10b-13)

77. Texaco repeats and realleges the averments of paragraphs 1 through 76 as if fully set forth herein.

78. Under 15 U.S.C. § 78j(b) and Rule 10b-13 promulgated thereunder, 17 C.F.R. § 240.10b-13, Pennzoil was prohibited from making an arrangement to purchase shares of Getty Oil stock other than pursuant to Pennzoil's existing tender offer. If, as Pennzoil asserts, it entered into a binding arrangement to purchase Getty Oil stock on January 3, 1984, that arrangement violated 15 U.S.C. § 78j(b) and Rule 10b-13 and was void under 15 U.S.C. § 78cc(b).

79. The Judgment and the *Pennzoil* rule reward Pennzoil for attempting to violate and for violating basic requirements of federal law, as embodied in Rule 10b-13, designed to protect shareholders from discriminatory and unfair treatment. The Judgment and the *Pennzoil* rule thereby threaten to undermine the efficacy of federal law by encouraging, and shielding from redress, the very conduct that federal law prohibits.

80. This impermissible consequence of the Judgment and the *Pennzoil* rule increases the already improper tactical advantage that the Judgment and the *Pennzoil* rule accord initial offerors, at the expense of shareholders, in contravention of federal law and policy.

81. Application of the supersedeas and lien provisions to bar appellate review threatens immediately to impose those impermissible consequences of the Judgment and the *Pennzoil* rule and to make those consequences irremediable. Application of the supersedeas and lien provisions is, therefore, void and of no legal effect under 15 U.S.C. § 78j(b), Rule 10b-13 and the Supremacy Clause.

FIFTH CAUSE OF ACTION

(Full Faith and Credit Clause)

82. Texaco realleges the averments of paragraphs 1 through 81 above as if fully set forth herein.

83. The Full Faith and Credit Clause requires the courts of the several States to respect the fundamental interests and policies of another State when bound to apply its law and to accord to applicable substantive laws of such other state the same force and effect accorded them in that State's courts.

84. These principles operate with special force where the interests of the state whose law is to be applied have carefully fashioned the cause of action to coincide with and promote governing federal interests.

85. By inhibiting competitive bidding for corporate control, the Judgment and the *Pennzoil* rule contravene and disregard important New York laws, interests and policies, in violation of the Full Faith and Credit Clause.

86. By thus contravening and disregarding New York laws, interests and policies, the Judgment and the *Pennzoil* rule unnecessarily create a conflict between New York law and paramount federal law, subjecting New York law to preemption and invalidation, all in violation of the Full Faith and Credit Clause.

87. By contravening and disregarding New York laws, interests and policies, the Judgment and the *Pennzoil* rule threaten substantially to disrupt the open market activity in connection with tender offers which is essential to New York's economy and which its laws seek to foster, all in violation of the Full Faith and Credit Clause.

88. Application of the supersedeas and lien provisions to bar appellate and Supreme Court review of the Judgment and the *Pennzoil* rule will render this contravention and disregard of New York's interests irremediable, in violation of the Full Faith and Credit Clause.

SIXTH CAUSE OF ACTION

(Due Process Clause and Equal Protection Clause)

89. Texaco realleges the averments of Paragraphs 1 through 88 above as if fully set forth herein.

90. The Texas Constitution accords Texaco a constitutional right to an appeal within the Texas State appellate system.

91. Under long established Texas constitutional law, that right may not be irrationally or unreasonably impeded, or made subject to burdens so severe that they cannot possibly be met.

92. Once Texas establishes a right to appeal free from such improper burdens, the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to constrain Texas from unreasonably or unfairly withholding that right.

93. Application of the supersedeas and lien provisions would destroy Texaco outright. Application of those provisions would thereby impose upon Texaco's attempted exercise of its right to appeal from the Judgment a manifestly arbitrary, unreasonable and unfair burden.

94. In light of the established and protected procedural right created and maintained by Texas, application of the supersedeas and lien provisions here would violate the Due Process and Equal Protection Clauses of the United States Constitution.

SEVENTH CAUSE OF ACTION

(Due Process Clause)

95. Texaco realleges the averments of Paragraphs 1 through 94 above as fully set forth herein.

96. The Judgment and the *Pennzoil* rule are the product of fundamental procedural unfairness, based upon all the surrounding circumstances of the *Pennzoil* action.

97. Because of this fundamental unfairness, the Judgment and the *Pennzoil* rule violate the Due Process Clause.

98. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule will render permanent and irremediable this violation of the Due Process Clause.

WHEREFORE, Texaco prays for:

1. A temporary restraining order and a preliminary and permanent injunction enjoining Pennzoil from taking any action to enforce the Judgment entered in the *Pennzoil* action, including, without limitation, attempting to obtain any judgment lien or abstract of judgment (pursuant to Tex. Prop. Code Ann. §§ 52.001 *et seq.*, or otherwise), or initiating or commencing any proceedings or actions based upon the Judgment, pending appeal or petition for certiorari from the Judgment and final resolution of this action;

2. A temporary restraining order and a preliminary and permanent injunction enjoining Pennzoil from taking any action to change the status quo as of December 11, 1985, not only while the *Pennzoil* action is within the jurisdiction of the Texas Court as described above but also pending appeal or petition for certiorari from the Judgment and final resolution of this action;

3. A declaration that application of the supersedeas and lien provisions to Texaco in the *Pennzoil* action pending appeal or petition for certiorari from the Judgment is unconstitutional and barred by federal law;

4. Texaco's costs of suit, including reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

5. Such other and further relief as this Court deems just and proper.

Dated: December 13, 1985

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO, INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

JOHN W. MCKENDREE
Post Office Box 2812
Denver, Colorado 80201

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. WHERE A STATE GRANTS THE RIGHT OF APPEAL FROM A CIVIL MONEY JUDGMENT STATE LIEN AND BOND PROVISIONS ARE SUBJECT TO FOURTEENTH AMENDMENT CONSTRAINTS	5
II. PENNZOIL'S JURISDICTIONAL CONTENTIONS ARE WITHOUT MERIT	12
A. This Is A Proper 42 U.S.C. § 1983 Suit	12
B. The District Court Properly Declined to Abstain From Deciding This Case	20
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Blum v. Yaretsky, 457 U.S. 991 14
Dennis v. Sparks, 449 U.S. 24 18
Douglas v. California, 372 U.S. 353 7
Edwards v. California, 314 U.S. 160 23
Evitts v. Lucey, 469 U.S. 387 ..... 2, 7, 9
Ex parte Virginia, 100 U.S. 339 19
Farmer v. Carpenters, 430 U.S. 290 8
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 13
Fuentes v. Shevin, 407 U.S. 67 ..... 3, 10
Gibson v. Berryhill, 411 U.S. 564 ..... 4, 23, 25
Griffin v. Illinois, 351 U.S. 12 7
Harrison v. N.A.A.C.P., 360 U.S. 167 ..... 24, 25
Henry v. First National Bank of Clarksdale, 585 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 ..... 4, 6, 22, 23
Jackson v. Metropolitan Edison Co., 419 U.S. 345 .. 14
Juidice v. Vail, 430 U.S. 327 23
Letter Carriers v. Austin, 418 U.S. 264 8
Linn v. Plant Guard Workers, 383 U.S. 53 8
Logan v. Zimmerman Brush Co., 455 U.S. 422 ..... 2, 7
Louis. & Nash. R.R. v. Stewart, 241 U.S. 261 ..... 3, 11
Lugar v. Edmondson Oil Co., 457 U.S. 922 ..... 4, 13, 14, 15, 16, 17
Mathews v. Eldridge, 424 U.S. 319 ..... 3, 10
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 10
Miofsky v. Superior Court of State of Cal., 703 F.2d 332 (6th Cir., 1983) 4, 21
Mitchum v. Foster, 405 U.S. 225 ..... 18, 19, 20, 23
Moore v. Sims, 442 U.S. 415 23
NAACP v. Claiborne Hardware Co., 458 U.S. 886 22
National Union v. Arnold, 348 U.S. 37 ..... 3, 10, 11
New Motor Vehicle Bd. v. Fox, 439 U.S. 96 9
Paraiso v. U.S., 207 U.S. 368 12
Railroad Commission v. Pullman Co., 312 U.S. 496 25
Rendell-Baker v. Kohn, 457 U.S. 830 ..... 14, 17

TABLE OF AUTHORITIES—Continued

Page

Traughber v. Beauchane, 760 F.2d 673 (6th Cir. 1985) 4, 21

Younger v. Harris, 401 U.S. 37 .....4, 12, 20, 21, 22, 23, 24, 25

STATUTES:

28 U.S.C. § 2283 (The Anti Injunction Act) 12, 18, 19, 20, 22, 23

42 U.S.C. § 1983 .....3, 12, 18, 19, 20

Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983) 5

Tex. R. Civ. P. 364b 5

MISCELLANEOUS:

Brief for Petitioner in Supreme Court of the United States No. 485, Oct. Term 1915 .....3, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1798

PENNZOIL COMPANY,

Appellant,

v.

TEXACO, INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

This brief *amici curiae* in support of the position of the appellee is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of national and international labor organizations having a total membership of approximately 13,000,000 working men and women, and by the Oil, Chemical and Atomic Workers International Union, AFL-CIO, an international union many of whose members work in the oil and gas industry, with the consent of the parties as provided for in this Court's rules.

SUMMARY OF ARGUMENT

I. In Point I of the Argument we show that application of Texas' lien and bond provisions would, in the circumstances of this case, deprive Texaco of due process of law in violation of the Fourteenth Amendment.

Where a state has created a right of appeal, the state must "offer each defendant a fair opportunity to obtain adjudication of the merits of his appeal". (*Evitts* v. *Lucey*, 469 U.S. 387, 405. See also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429-430.)

The purpose of lien and bond provisions such as those of Texas herein is to protect the judgment creditor against the dissipation of the judgment creditor's assets pending appeal. But that policy does not come into play where (as the Chairman of Pennzoil's Board acknowledged is true here) the judgment is secure without imposing potentially ruinous requirements on the prospective appellant. The mandatory posting of full security in such a situation cuts deeply into the defendant's due process rights, all the more so where a claim of error on the state appeal will be that the judgment is excessive. A legal rule that conditions the right of appeal (or the suspension of the judgment pending appeal) on the posting of a bond in the amount of the judgment has the perverse consequence of insulating an error from review because of its very magnitude.

Pennzoil would have the Court decide the due process issue presented here under the "minimum rationality" standard applicable to economic regulation. It is highly doubtful whether the application of Texas' lien and bond provisions in this case would satisfy even that standard. In any event, Pennzoil is wrong on principle. This constitutional issue concerns the respective rights of judgment creditors and judgment debtors as *litigants* rather than as "economic actors". (Brief for Appellant Pennzoil Company ("Pennz. Br.") 49) Thus, easy cases like the

present, and closer ones that may arise in the future, should be decided according to the standard of review pertaining to *procedural* due process where this Court has consistently conducted a more rigorous inquiry. (*E.g.*, *Fuentes* v. *Shevin*, 407 U.S. 67, 80-93; *Mathews* v. *Eldridge*, 424 U.S. 319, 332-349.)

Pennzoil asserts that the constitutional ruling of the Court of Appeals is contrary to precedent in this Court. But neither of the two cases that Pennzoil cites for that proposition passed on the constitutionality of a law which required a bond as a condition for a stay of execution pending appeal. In the first of these, *National Union* v. *Arnold*, 348 U.S. 37, the Court held only that a state court may constitutionally dismiss an appeal for failure to comply with a court order, entered in aid of execution, requiring the defendant-appellant to deposit certain assets in the court pending appeal. In *Louis. & Nash. R.R.* v. *Stewart*, 241 U.S. 261, the issue was whether a state may, if the appeal is unsuccessful, add ten percent to the judgment as the cost of obtaining a supersedeas. Pennzoil's citation of the *Stewart* case is doubly erroneous because the Court's opinion does not purport to decide any due process issue, and, indeed, the petitioner in this Court argued only that the Federal Employer's Liability Act did not authorize the state courts to make such an award. (See Br. for Petitioner No. 485, Oct. Term 1915, p. 10.)

II. Our discussion in the Argument thus establishes that Texaco has shown deprivation of a right "secured by the constitution and laws of the United States". The second element of a 42 U.S.C. § 1983 claim—that the defendants have acted "under color of state law," in other words, that "state action" must be shown—is also satisfied here. The usually more troublesome issues in determining whether there is state action are not in controversy in this case because, under Texas law, the state is directly involved in making an attachment if the judg-

ment debtor does not post a supersedeas bond in the full amount of the judgment. Pennzoil, however, disputes the proposition that this system of executing judgments constitutes joint action by the judgment creditor and the state. The court below correctly rejected that contention on the authority of *Lugar* v. *Edmondson Oil Company*, 457 U.S. 922. The joint action provided for by Texas law is indistinguishable from that found in *Lugar*; the circumstance that a *post*judgment rather than a *pre*judgment attachment is at issue here does not change the nature of this joint action.

There is no merit to Pennzoil's contention that the courts below should have abstained under *Younger* v. *Harris*, 401 U.S. 37. The Court of Appeal's conclusion that this case does not implicate "important", "substantial" or "vital" state interests and that abstention would therefore be inappropriate is fully in accord with *Younger* and its progeny and the decisions of other courts of appeals. See, *e.g.*, *Traughber* v. *Beauchane*, 760 F.2d 673, 680-81 (6th Cir., 1985); *Miofsky* v. *Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983); *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir., 1979), *cert. denied*, 444 U.S. 1074. Moreover, the court below correctly concluded that abstention under *Younger* naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. *Gibson* v. *Berryhill*, 411 U.S. 564, 577. In contending, contrary to the Court of Appeals, that Texas law would have provided Texaco with such an opportunity, Pennzoil does not even discuss the Texas decisions to the opposite effect which were carefully analyzed by the Court of Appeals.

ARGUMENT

I. WHERE A STATE GRANTS THE RIGHT OF APPEAL FROM A CIVIL MONEY JUDGMENT, STATE LIEN AND BOND PROVISIONS WHICH BURDEN THAT RIGHT ARE SUBJECT TO FOURTEENTH AMENDMENT CONSTRAINTS.

A. Under Texas law a defendant in a lawsuit who has suffered a money judgment and who desires to appeal may suspend the execution of the judgment only by filing a bond in "at least the amount of the judgment, interest, and costs" or by depositing such amount with the court. (Tex. R. Civ. P. 364b. See 784 F.2d at 1138 and n.4.)[1] In upholding the grant of a preliminary injunction against the enforcement of that requirement in this case the Court of Appeals held "that Texaco's claim that the Texas bond and lien provisions den[ied] due process presents a fair ground for litigation." (784 F.2d at 1153-1154.)

The Court of Appeals observed that its "decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur." (784 F.2d at 1157.) After describing those circumstances, the Court continued: "For these reasons our decision, like that of the Fifth Circuit in *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application." (784 F.2d at 1157.) While we agree that there will be few occasions on which it will be necessary for a federal court to issue an injunction in order to protect a state court defendant's right to appeal in the face of state law security requirements which

---

[1] See also Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983) which "provides that an abstract of judgment presented by the judgment creditor, when properly recorded and indexed, constitutes a lien 'on the property of the defendant located in the county in which the abstract was recorded and indexed . . .'" (784 F.2d at 1138, quoting § 52.001.)

would make the appeal impossible or create severe hardship for the defendant, the principle enunciated by the court below is nevertheless an important one.

As the *Henry* case cited by the Court of Appeals illustrates, organizations or other parties which are unpopular in a particular jurisdiction, or whose behavior a particular court or jury finds to be especially offensive may be faced with a judgment of such enormity (compared to their assets) that they are unable to satisfy the state's lien and bond requirements or are able to do so only by taking steps that cause them irreparable harm during the pendency of the appeal.

Moreover, in many such cases, permitting execution will be so harmful to the defendant that the plaintiff will be able to use the threat to execute to coerce a settlement from the defendant on terms that do not fairly reflect the strength of each party's position with respect to the merits of the appeal. The present case appears to be an instance of the use of such state security laws as a bargaining weapon. (See 784 F.2d at 1155.)

It is also true that there have been cases in which a prospective appellant is required to post a bond in the amount of the judgment (or greater) in order to stay execution pending appeal even though the judgment debtor cannot as a practical matter comply with the bond requirement and the size of the judgment is itself a ground for appeal. Based on our understanding of Texaco's arguments on appeal from the state court judgment at issue here, this is such a case.

In each of the foregoing ways, state lien and bond requirements may be applied so as to undermine the essential fairness of the state's procedures for adjudicating civil claims and, indeed, so as to threaten the even-handed application of the rule of law.

B. The Court of Appeals recognized that "due process requires that, once the state has created a right of appeal,

it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" (784 F.2d at 1154, quoting *Evitts* v. *Lucey*, 469 U.S. 387, 405.) *Evitts* was a criminal case, but its principle applies equally to civil cases like the instant one. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429-430, a civil case, the Court held that "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971)." [2]

Pennzoil's own discussion of the purpose of the Texas law at issue here shows that the application of the state's rules in the circumstance of this case would be unconstitutional. In Pennzoil's words: "Some 30 . . . states, including Texas, have decided that, once a trial is complete, the judgment creditor is presumptively entitled to a supersedeas bond equal to or greater than the judgment, as assurance that the creditor will be able to collect the award (and interest) if it is ultimately affirmed." (Brief for Appellant Pennzoil Company ("Pennz. Br.") 47.)[3] The conclusion that such a law

---

[2] See also Justice Harlan's dissenting opinion in *Griffin* v. *Illinois*, 351 U.S. 12 at 37: "Of course the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed." Justice Harlan subsequently stated, that "[so] far as the result in that case rested on due process grounds, I fully accept the authority of *Griffin*." (*Douglas* v. *California*, 372 U.S. 353 at 361, n.1 (dissenting opinion).)

[3] The word "presumptively", used in the same context at Pennz. Br. 46, is apparently designed to convey the impression that Texas will grant the judgment debtor relief from "the general rule" (*id.*); *viz.*, that state law permits the presumption to be rebutted. The court below concluded that Texas law is to the contrary. (784 F.2d at 1148-1149.)

may not, consistent with due process, be applied where the court determines that the judgment creditor will be able to collect on his judgment (and interest) without the judgment debtor being required to post such security does not, as Pennzoil argues, "countermand [that] state policy choice" (Pennz. Br. 48). In terms of the present record, requiring Texaco to post a bond in the amount of the state court judgment or suffer attachment of its property pending appeal is not necessary to accomplish Texas policy of protecting Pennzoil's interest in ultimately obtaining the fruits of its judgment in the event of affirmance and, in the circumstances here, that requirement as a practical matter is ruinous to Texaco.

The mandatory posting of full security in such a situation cuts deeply into the defendant's due process rights particularly where the claim of error on appeal is that the jury has been erroneously instructed on the measure of damages, or on the availability or amount of punitive damages that may be awarded, or that the jury was improperly swayed by sympathy for the plaintiff and repugnance to the defendant and the trial court failed to set aside the excessive verdict.[4] For a legal rule that conditions appeal (or the suspension of the judgment pending appeal) on the posting of a bond in the amount of the judgment has the perverse consequence of preventing review of the error because of its very magnitude: The greater the judgment, compared to the assets of the defendant, the more likely it would be that the error is insulated from appellate scrutiny.

---

[4] The problem described in the text is of special concern to labor organizations. In *Linn* v. *Plant Guard Workers*, 383 U.S. 53, this Court held that states may entertain defamation suits arising out of a labor dispute but admonished that "[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial. (*Id.* at 65-66). The Court has twice since deemed it necessary to reiterate that admonition. *Letter Carriers v. Austin*, 418 U.S. 264, 287, n.17 (defamation); *Farmer v. Carpenters*, 430 U.S. 290, 306 (intentional infliction of mental suffering).

In a case like this one, then, Texas' security requirement denies due process because the state law both fails to "offer [the] defendant a fair opportunity to obtain an adjudication on the merits of his appeal" (*Evitts* v. *Lucey*, 469 U.S. at 405) and does so without advancing any substantial state interest, indeed, without any discernible reason.

C. The egregious situation presented here far from exhausts the situations in which state lien and bond laws seriously burden the right to appeal. Where such laws operate in a less rigorous and arbitrary manner, a judgment debtor's constitutional attack will, of course, have far less force than Texaco's. It is not necessary and, we submit, not wise or prudent, to prejudge such cases by taking the initial occasion on which this Court is called upon to consider the complex set of questions presented here to settle all facets of the problem. It is appropriate, nonetheless, we believe, to respond to two arguments advanced by Pennzoil which, if given credence, would seriously prejudice the further development of the law in this area.

1. Pennzoil would restrict constitutional review of Texas' lien and bond laws to the "test of minimum rationality" by treating the constitutional issue here as if "economic regulation," whereby the state "has subordinated the rights of some economic actors" to the conflicting rights of others, were involved. (Pennz. Br. 49.) But while economics in the sense of money is unquestionably at the core of the controversy between Pennzoil and Texaco, the constitutional issue does not concern their respective rights as "economic actors" but as *litigants*. The standard by which Texas' and like, laws, is to be reviewed is, therefore, not that which has prevailed "since the demise of the concept of 'substantive due process' *in the area of economic regulation*," (*id.*, quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox*

Co., 439 U.S. 96, 106-107, our emphasis), but that pertaining to *procedural due process*, where this Court has consistently conducted a more rigorous inquiry. (See, *e.g.*, *Fuentes* v. *Shevin*, 407 U.S. 67, 80-93; *Mathews* v. *Eldridge*, 424 U.S. 319, 332-349; *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 12-22.)

2. According to Pennzoil, "[u]ntil the ruling below, it was well established that a civil litigant, however sympathetic in its case, has no due process right to be free from the execution of a judgment pending its appeal," saying that "this Court has expressly so held." (Pennz. Br. 48.) Neither of the two cases cited for that proposition so much as considered the questions presented here.

In *National Union* v. *Arnold*, 348 U.S. 37, the state trial court had ordered the petitioner to deliver certain bonds to a receiver for deposit in court in order to secure the trial court's judgment pending appeal. When the petitioner failed to do so the court adjudicated that party in contempt and when the petitioner failed to purge itself of the contempt by delivering the bonds, dismissed the appeal. The petitioner did not in this Court challenge the validity of the trial court's order to deliver the bonds, let alone contend that it was impossible, or even difficult, to produce security for the judgment pending appeal; indeed, the supplemental proceedings which gave rise to the order established that the petitioner could do so by depositing the bonds. Rather, the petitioner's contention was that, *without regard to the practicalities, dismissal of its appeal for failure to comply with that execution order* violated its rights under the Fourteenth Amendment. In rejecting that due process argument the Court analogized the dismissal of an appeal because of a refusal to comply with an order to produce to the often approved dismissal of a criminal appeal because the appellant has become a fugitive from justice:

> While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal. [348 U.S. at 43.]

The constitutional issue presented by this case was likewise not presented or decided in *Louis. & Nash. R.R.* v. *Stewart*, 241 U.S. 261. The sentence from which Pennzoil plucks one clause (Pennz. Br. 48) reads in full:

> There was no obligation upon the State to provide for a suspension of the judgment and *nothing to prevent its making it costly in cases where ultimately the judgment is upheld.* [241 U.S. at 263, emphasis added]

The railroad, which was the judgment loser in the state trial court, did not contend that the state law supersedeas bond provisions had prevented an appeal from that judgment or so burdened the railroad as to render its appeal a meaningless ritual. Rather, the railroad's argument in this Court was that the state appellate court erred in adding ten percent damages to the amount of the judgment when the appeal was unsuccessful for the cost of obtaining a supersedeas. Even that issue, remote as it is from this case, was *not* raised—and therefore not decided—under either the Due Process or Equal Protection Clause of the Fourteenth Amendment. Rather, the railroad *argued only that the Federal Employers Liability Act* (FELA) (under which the claim at issue had been brought) *did not authorize the state courts to make such an award.*[5] In short, the fragment

---

[5] The railroad stated its position in *Louis. & Nash. R.R.* as follows:

> 1. Defendant's first assignment of error, that "the said Court of Appeals of Kentucky erred in entering judgment

of a sentence on which Pennzoil relies is mere *dictum*, and at that not even on a point of constitutional law. To be sure, Justice Holmes' terse style "did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert". (*Paraiso* v. *U.S.*, 207 U.S. 368, 372, Holmes, J.). But is it now to be supposed that the Court reached out to interpret the Fourteenth Amendment in disposing of an argument which invoked only the FELA?

II. PENNZOIL'S JURISDICTIONAL CONTENTIONS ARE WITHOUT MERIT.

Pennzoil contests federal jurisdiction over Texaco's claims on two grounds: (a) that the Anti-Injunction Act, 28 U.S.C. § 2283, bars the federal courts from exercising their equity powers in this type of case; and (b) that *Younger* v. *Harris*, 401 U.S. 37, and its progeny require abstention in the present circumstances. The Court of Appeals correctly rejected both contentions.

A. This Is A Proper 42 U.S.C. § 1983 Suit.

1. The Court of Appeals held that Texaco's challenge to the Texas lien and supersedeas bond provisions as applied here states the essential elements of an action under 42 U.S.C. § 1983, and that injunctive relief on those claims is therefore not subject to the restrictions of the Anti-Injunction Act. "In order to maintain a § 1983 claim", said that court,

---

affirming the judgment of the Warren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error," challenges the right of the Court of Appeals of Kentucky to affirm the judgment in this case with damages and interest, in that there is no provision in the Federal Employers' Liability Act authorizing the allowance of interest and damages in addition to compensation for loss of pecuniary benefits. [Br. for Petitioner, No. 485, Oct. Term, 1915, p. 10; bold face omitted]

> a litigant must allege and show deprivation (1) of a right "secured by the Constitution and laws of the United States", (2) by a defendant acting under color of state law. [784 F.2d 1145, citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155.]

The first of these elements, the deprivation of a constitutional right, has been discussed in Point I, *supra;* since Pennzoil contests the presence of the second of these elements as well, we turn now to the "color of state law" issue.

The Court of Appeals found that, in the circumstances here, Pennzoil is a state actor (and is therefore acting under "color of state law") primarily on the authority of *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922.[6] *Lugar* sets forth a two-part approach for determining whether conduct which results in deprivation of a federal right is "fairly attributable to the state":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. [457 U.S. at 937, quoted at 784 F.2d at 1145.]

In the present case, the Court of Appeals determined that

> Texaco has satisfied the first prong of this test since Texas state law provides for enforcement of the judgment unless Texaco posts a supersedeas bond in

---

[6] *Lugar* held that "[i]f the challenged conduct of [a party] constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." (457 U.S. at 935.)

> the full amount of the judgment. Tex.R.Civ.P. 364(b), *supra*. [784 F.2d at 1145.][7]

With regard to the second prong of the *Lugar* test we recognize at the outset that the conclusion that an otherwise private party is a state actor to whom the Constitution applies is strong social medicine. Accordingly, as the *Lugar* Court emphasized,

> [c]areful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order. [457 U.S. at 936-937.]

The most attenuated state action claims are those based on the theory that an otherwise private party, *acting on its own and without the involvement of state officials*, is the recipient of sufficient state approval or support to be deemed a state actor. See *e.g.*, *Rendell-Baker* v. *Kohn*, *supra*, and *Blum* v. *Yaretsky*, *supra*. This is not such a case, as the Court of Appeals recognized:

> To enforce the judgment, Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets. A judgment creditor must first obtain a writ of execution, which is "a process of the court from which it is issued." Tex.R.Civ.P. 622. The writ is "'directed to

---

[7] In two cases decided on the same day as *Lugar*, the Court held that the challenged conduct of the private party was not "state action" because the federal plaintiffs had not established the "first prong", *viz.*, had failed to show state involvement in the allegedly unconstitutional conduct. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-840; *Blum v. Yaretsky*, 457 U.S. 991, 1002-1012. See also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351.

> any sheriff or any constable within the State of Texas" and must be signed by the clerk or justice and bear the seal of the court. Tex.R.Civ.P. 629. Furthermore, the writ "shall require the officer to execute according to its terms." *Id.* Finally, when, as here, the judgment requires payment of money, the writ "must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law." Tex.R.Civ.P. 630. When the sheriff or constable receives the writ, Texas law commands that "he shall proceed without delay to levy the same upon the property of the defendant". Tex.R.Civ.P. 637. Property levied upon pursuant to the writ of execution may ultimately be seized by the officer and liquidated to satisfy the judgment. Tex.R.Civ.P. 646a, 649.
>
> In addition, Texas law authorizes the placement of judgment liens upon Texaco's property in the state immediately upon entry of judgment. Tex. Prop.Code Ann. § 52.001. Such liens are acquired by requesting state officials to undertake a series of acts. Pennzoil must obtain a certified abstract of the judgment from the clerk of the court which rendered judgment. *Id.* § 52.002. The abstract must contain certain information required by law. *Id.* § 52.003. The county clerk must then record the abstract in the county judgment record and enter it in the index to the record. *Id.* § 52.004.
>
> Enforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of § 1983. [784 F.2d at 1145-1146.]

In short, the requisite *joint action* between Pennzoil and state officials was deemed by the court below to be indistinguishable from that in *Lugar* which, like this case, involved the question of whether an attachment pursuant to state law—there, the law of Virginia—is properly deemed state action. (See 784 F.2d at 1146.)

The Court of Appeals concluded further that the circumstances that *Lugar* involved a *pre*judgment attachment whereas this case involves a *post*judgment attachment is an immaterial difference:

> The presence of a court judgment does not alter the fact that Texas state officials execute the judgment only at Pennzoil's behest. Pennzoil cannot be divorced from that execution procedure merely because a court authorized execution of the judgment. Indeed, to so hold would preclude the victim from obtaining relief against the party who must act jointly with the state official to unleash the unconstitutional state government action. [784 F.2d at 1146.]

In this Court, Pennzoil takes issue with the court below principally on the ground that *Lugar* is inapplicable because the *Lugar* opinion stated that the Court's holding there "was limited to the particular context of prejudgment attachment." (Pennz. Br. 12, quoting 475 U.S. at 939, n.21.)[8]

The assertion that *Lugar* left open the question whether a private party may, in certain situations, be deemed a state actor by its use of postjudgment attach-

---

[8] Pennz. Br. 13 asserts that this limitation in the *Lugar* Court's holding was "twice expressly stated", citing also 457 U.S. at 942. In this respect, Pennzoil clearly errs, for at that point there is no reference to the prejudgment aspect of that case; rather, the Court referred to "state-created attachment procedures" generally:

> The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of *state-created attachment procedures*. That holding is contrary to the conclusions we have reached as to the *applicability of due process standards to such procedures*. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute. [457 U.S. at 942, emphasis added.]

ment procedures states the problem, not the answer. And that concededly open question is, of course, to be decided according to the principles declared in *Lugar* and this Court's other state action decisions.

It is clear from these decisions that the critical consideration in a case like this is "joint participation" between the private party and state officials in the deprivation of the asserted constitutional right. *Lugar*, 457 U.S. at 941-942. See also *Rendell-Baker* v. *Kohn*, 457 U.S. at 838-839, n.6: "*Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), and *Lugar* [457 U.S.] p. 922, illustrate the relevance of whether action was taken in concert with a state actor."

There is no doubt that the circumstance that an attachment occurs after a judgment is obtained rather than before affects the determination of whether the procedures that were followed violate the Constitution. (See Point I, *supra.*) But as a matter of simple logic, it is beyond dispute that a postjudgment attachment accomplished with the same type and quantum of joint participation with state officials as a prejudgment attachment is as much state action as the prejudgment attachment. Such a postjudgment attachment may be constitutional even if the prejudgment attachment is not; but under the *Lugar* analysis, both are state action. The Court of Appeals was therefore correct in refusing to find the *timing* of an attachment a basis for distinguishing between the state action in *Lugar* and that here.[9]

---

[9] Pennzoil asserts that "surely the 4½ month trial that preceded the entry of Pennzoil's judgment involved 'the independent judgment of the state judiciary,' and this is where the contrast with *Lugar*—and the Second Circuit's error—could not be more plain." (Pennz. Br. 14.) Pennzoil's certitude is wholly unjustified. The "independent judgment of the state judiciary" was obtained on the *merits* of Pennzoil's suit against Texaco, but—under the Texas procedure—no such independent judgment operates as a restraint on the attachment, whose constitutionality is the issue herein. This distinction between adjudication of the claim and of the attachment

2. In *Mitchum* v. *Foster*, 407 U.S. 225, 226, the Court began by stating:

> The federal anti-injunction statute provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." An Act of Congress, 42 U.S.C. § 1983, expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges, or immunities secured by the Constitution. . . ." The question before us is whether this "Act of Congress" comes within the "expressly authorized" exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court. [Footnotes omitted.]

And the *Mitchum* Court held without dissent: "[U]nder the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law." (407 U.S. at 242-243.)

Pennzoil nonetheless attempts to use the *Mitchum* holding as a ground for restricting the coverage of § 1983 by arguing that § 1983 must be construed—and limited—by considering its effects on the Anti-Injunction Act. (Pennz. Br. 15-17.) It is Pennzoil's argument in this

---

procedure fundamentally differentiates this case from *Dennis v. Sparks*, 449 U.S. 24, 28, cited at Pennz. Br. 15, as the Court of Appeals recognized:

> Finally, we note that Texaco's challenge to the state bond and lien provisions does not call into question the validity of the underlying judgment. Thus, this is not a case where a private party is alleged to be a state actor merely because it brought suit and sought a judicial ruling. *See Dennis v. Sparks*, 449 U.S. 24, 28. [784 F.2d at 1146-1147.]

Thus, Pennzoil's argument in this respect is not only beside the point for the reason given in the text, but wrong in its own terms as well.

regard that would "turn[] the law on its head". (*Cf.*, *id.* at 8.)

There is no justification whatsoever for narrowing § 1983 in light of the Anti-Injunction Act. Rather, § 1983 is to be construed in the light of its "very purpose"; *viz.*, "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" (*Mitchum*, 407 U.S. at 242, quoting *Ex parte Virginia*, 100 U.S. 339, 346.) For the "expressly authorized by Act of Congress" exception written into the Anti-Injunction Act embodies the Legislature's determination that "the policies animating" that Act (Pennz. Br. 16) are *not* absolute; those policies do *not* override other Acts of Congress which "clearly creat[e] a federal right or remedy enforceable in a federal court of equity [that] could be given its intended scope only by the stay of a state court proceeding" (*Mitchum*, 407 U.S. at 238).[10]

It follows that the Court of Appeals was entirely correct in refusing to be led astray by an inquiry into the effects of its interpretation on the operations of the Anti-Injunction Act; an inquiry which Congress rendered wholly inappropriate by the "expressly authorized" exception to that Act.

Pennzoil's frenzied efforts to find a way to reduce the scope of § 1983 fails also because Pennzoil grossly exaggerates the effect of the decision below on the federal courts' power to enjoin state court proceedings. Pennzoil says that if the decision below is affirmed, the "result will

---

[10] Pennzoil's assertion in its summary of argument that the Anti-Injunction Act is the "statute through which Congress, ever since 1793, has voiced a *steadfast insistence* that the federal courts not interfere with state court proceedings (Pennz. Br. 8, emphasis added) thus betrays a steadfast insistence on Pennzoil's part to ignore that Act's literal language and this Court's *Mitchum* holding.

be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes". (Pennz. Br. 16.) Simply stated, Pennzoil's entire discussion proceeds as if it were sufficient to establish a violation of § 1983 that "a private litigant", or "state court judgment winner" is the defendant in the § 1983 case. That, of course, is not the rule. The court below in the first place did not decide that every such party is a "state actor". The argument at Pennz. Br. 15-17, moreover, entirely ignores the proposition that a § 1983 case can be made out *only by establishing the violation of a federal constitutional right.* This is the major hurdle which will inhibit "state court judgment losers [from] mount[ing] collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process." (Pennz. Br. 17.) Every action of the government is, of course, state action but that does not mean that all such actions are the stuff for making § 1983 complaints. Prospective plaintiffs know that it is the substance of the relevant constitutional law that is the ultimate determinant of whether state action creates a colorable § 1983 claim.

In sum, Pennzoil's argument is irreconcilable with *Mitchum* and unfaithful to both the "very purpose" of § 1983 and to Congress' decision to circumscribe the Anti-Injunction Act by enacting the "expressly authorized" exception to that Act.

B. The District Court Properly Declined to Abstain from Deciding This Case.

Pennzoil reiterates its contention, rejected by the Court of Appeals, that *Younger* v. *Harris*, *supra*, requires the District Court to abstain from deciding Texaco's claims at issue here. The court below ruled that Pennzoil had failed to satisfy two of the essential elements for *Younger* abstention: "(1) 'important', 'sub-

stantial' or 'vital' state interests must be at stake, and (2) state procedures must be available to provide an adequate opportunity for the appellant to raise his federal claims in a state court." (784 F.2d at 1149.)

In this Court, Pennzoil contends that Texaco has "pioneered" and the Second Circuit has "endorsed" "escape routes" from *Younger*. (Pennz. Br. 23, heading.) While this is a neat metaphor, the adventurism is all on Pennzoil's part; the decision below is in fact in complete accord with precedent.

1. In holding that the first of the conditions for *Younger* abstention just quoted was not met here, the Second Circuit said:

> Pennzoil's contention would also render meaningless and unnecessary the exercise, regularly engaged in by federal courts called upon to abstain, of analyzing the state interests and remedies involved to determine whether *Younger* abstention is mandated. *See, e.g., Traughber v. Beauchane*, 760 F.2d 673, 680-81 (6th Cir. 1985); *Miofsky v. Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983). [784 F.2d at 1149.]

In *Traughber*, Judge Krupansky had written:

> It is immediately obvious that the case at bar is vitally different from each of the cases in which the Supreme Court has permitted the extension of *Younger* to putatively "civil" state proceedings. In each such case the state was a party to the underlying state judicial proceeding. In addition, each of those cases was criminal or quasicriminal in nature or otherwise presented issues on matters essential to the operation of the state government. *See Miofsky v. Superior Court*, 703 F.2d 332, 337 (9th Cir. 1983). [760 F.2d at 680.]

The analysis of the court below in this case, of the Sixth Circuit in *Traughber* and of the Ninth Circuit in *Miofsky* rests on a thorough examination of this Court's decisions; we therefore add only one word to their reasoning.

It bears recalling that in this respect, as well as in its other jurisdictional aspects, the Court of Appeals' decision herein was anticipated by *Henry* v. *First National Bank of Clarksdale, supra.* In *Henry*, the Fifth Circuit affirmed an injunction staying enforcement of the damage judgment subsequently set aside by this Court on First Amendment grounds in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886. With respect to abstention under *Younger*, the Fifth Circuit ruled, anticipating the reasoning of the court below:

> While certain considerations of comity and federalism pertain to civil proceedings as well as to criminal prosecutions the Supreme Court thus far has declined to extend the *Younger* doctrine to all civil litigation. [595 F.2d at 300.]

Pennzoil, however, would brush *Henry* aside, saying: "With respect to staying enforcement of the award of damages, the injunction was not issued to preserve appellate jurisdiction over the state judgment, but in aid of a prior, never-appealed and never-dissolved injunction issued by the district court itself, which concerned bank accounts containing the funds of the state court defendant." (Pennz. Br. 38, n.35.) That assertion is manifestly incorrect. The District Court in *Henry* had entered *three* orders; only one of these (discussed in Part II of the Fifth Circuit's opinion (595 F.2d at 305-307)) was predicated, and affirmed, on the basis of the prior injunctions to which Pennzoil refers. (See also the quotation at Pennz. Br. 38-39, n.35 of 595 F.2d at 307.) In Part I of the *Henry* opinion, the Fifth Circuit discussed and affirmed "the broadest of the three [injunctive] orders [,which] largely encompassed the relief embodied in the other two." It is in this portion of its opinion that the *Henry* court rejected contentions (identical to those made by Pennzoil here) based on 28 U.S.C. § 2283 and *Younger*. In deciding those issues and affirming the "broadest" of the district court's injunctive orders the Fifth Circuit

did not rely on the prior "bank accounts" injunction that had been entered in that case.[11]

2. Abstention under *Younger* "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U.S. 564, 577. *See also Moore* v. *Sims*, 442 U.S. 415, 425, quoting *Juidice* v. *Vail*, 430 U.S. 327, 337. This opportunity must be real rather than theoretical; the potential for relief in the state court must not be a mere "teasing illusion like a munificient bequest in a pauper's will" (*Edwards* v. *California*, 314 U.S. 160, 186 (Jackson, J., concurring), quoted in part at Pennz. Br. 49).[12]

While their adequacy for *Younger* purposes is a matter of federal law, the question of what opportunities

---

[11] This is so plain from the language and structure of the *Henry* opinion that emphasis should be unnecessary. But given Pennzoil's apparent misunderstanding, we note that if the affirmance of the first order had rested at all on the prior injunction, the Fifth Circuit's discussion of the "expressly authorized exception" and of *Mitchum, supra* (595 F.2d at 300), would have been superfluous; 28 U.S.C. § 2283 would have been inoperative by virtue of the "where necessary . . . to protect or effectuate its judgments" exception, *as the Fifth Circuit ruled in Part II of its opinion with respect to the District Court's second order* (595 F.2d at 306).

[12] Such an opportunity, we submit, requires that the state courts would entertain a challenge to the state law or its application to the appellant before that party suffers irreparable injury. Pennzoil argues at length that Texas law would have provided Texaco with such an opportunity. (Pennz. Br. 25-32.) The court below, as we have noted, held to the contrary. (784 F.2d at 1150-1152.) The question whether the Court of Appeals erred in its reading of Texas law was not separately raised in the Jurisdictional Statement, perhaps on the anticipation that, if Pennzoil prevails in the Texas court, it will resist a *certiorari* petition by Texaco for review by this Court of an adverse interpretation of the applicable law of New York. If, nevertheless, the issue is properly presented as encompassed in the questions which Pennzoil did raise, we leave it to the briefs of the parties. We do note, however, that Pennzoil fails to discuss any of the Texas cases relied on by the court below on this point.

the state courts actually afford the federal plaintiff is a matter of state law. That question of state law will often be hotly contested in the federal district court (as this case illustrates). An erroneous federal court decision one way or the other may well have undesirable consequences: If the federal court determines that state law does provide an adequate opportunity and events prove otherwise, federal rights may be forfeited; if the federal court takes too narrow a view of the opportunity provided by state law, the objectives of the *Younger* doctrine may be needlessly sacrificed. We submit that this is therefore an appropriate occasion to remind the lower courts that where the state law questions are close and there are other relevant factors militating toward abstention, this Court's decision in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, provides a practical means for avoiding this dilemma. There, Justice Harlan wrote:

> Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irrparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assumption "that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached . . ." 159 F. Supp. at 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrace also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. *While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this*

case goes forward. [360 U.S. at 178-179; emphasis supplied.] [13]

The lesson of *Harrison* for cases like the present (again assuming *arguendo* that *Younger* is applicable) is clear. If the district court determines that the federal plaintiff has or may have an opportunity to secure relief in state court from the onerous requirements of the state lien and bond provisions and should be required to invoke those potential remedies, that court should protect the the federal court plaintiff against irreparable injury during the state proceedings and, if state court relief is denied, until the federal court has the opportunity to adjudicate the federal claim. *Harrison* teaches that the district court may therefore retain jurisdiction over the § 1983 action and condition its direction that the state remedy be pursued on the federal court defendant's commitment (or on an order binding that party) not to execute on the federal plaintiff's property without further order of the federal court.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

JOHN W. MCKENDREE
Post Office Box 2812
Denver, Colorado 80201

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

---

[13] *Harrison* involved abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, but its approach is equally sound when the federal court abstains under *Younger*. Both doctrines are designed to further comity with state procedures, rather than to enable the federal court defendant to inflict irreparable injury on the federal court plaintiff. *See Gibson v. Berryhill, supra,* quoted at p. 24, *supra.*

Supreme Court, U.S.
FILED
NOV 4 1986
SPANIOL, JR.
CLERK

No. 85-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PENNZOIL COMPANY,
Appellant,
v.
TEXACO, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

DAVID S. TATEL *
ALLEN R. SNYDER
WALTER A. SMITH, JR.
BRADLEY SAXTON
DEBORAH J. JEFFREY
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amicus Curiae National Association for the Advancement of Colored People

GROVER G. HANKINS
General Counsel
National Association for the Advancement of Colored People
4805 Mount Hope Drive
Baltimore, MD 21215
(301) 358-8900

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. A State May Not Constitutionally Prohibit Meaningful Access To Its Appellate Courts Through Imposition Of An Oppressive Supersedeas Bond Requirement	5
II. State Court Defendants Seeking To Vindicate Their Due Process Guarantee Of Access To A State Appellate Forum Are Entitled To Choose Either The Federal Or The State Court In Which To Pursue That Claim	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Allen v. *McCurry*, 449 U.S. 90 (1980) 14
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 6, 7, 8, 9
District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 12
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 13
Evitts v. *Lucey*, 469 U.S. 387 (1985) 5
Ex parte Virginia, 100 U.S. 339 (1980) 12
Henry v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied sub nom. Claiborne Hardware Co.* v. *Henry*, 444 U.S. 1074 (1980) ..... *passim*
Lecates v. *Justice of the Peace Court No. 4*, 637 F.2d 898 (3d Cir. 1980) 9
Lindsey v. *Normet*, 405 U.S. 56 (1972) 5
Little v. *Streater*, 452 U.S. 1 (1981) 7, 8
Louisville and Nashville Railroad v. *Stewart*, 241 U.S. 261 (1916) 5
Mitchum v. *Foster*, 407 U.S. 225 (1971) 12
Monroe v. *Pape*, 365 U.S. 167 (1961) 12
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 2
NAACP v. *Moody*, 350 So. 2d 1365 (Miss. 1977) 10
National Socialist Party of America v. *Village of Skokie*, 432 U.S. 43 (1977) 11, 12
Ortwein v. *Schwab*, 410 U.S. 656 (1973) 7, 8, 9
Patsy v. *Board of Regents*, 457 U.S. 496 (1982) 12, 13, 14
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) 12
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 7
Steffel v. *Thompson*, 415 U.S. 452 (1974) 13, 14
Texaco, Inc. v. *Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986) 9, 11, 14
United States v. *Kras*, 409 U.S. 434 (1973) 6, 7, 8, 9
Younger v. *Harris*, 401 U.S. 37 (1971) 11

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS & STATUTES:

	Page
U.S. Constitution Fourteenth Amendment	*passim*
28 U.S.C. § 2283 (1982)	11
42 U.S.C. § 1983 (1982)	4, 12, 13, 14

OTHER AUTHORITIES:

"Lack of Black Teachers Sparks Rural Georgia School Boycott," Associated Press, Aug. 23, 1986, § Domestic News (available on NEXIS)	10
"Lawn Chair Protesters May Be Back When It's Cooler," Associated Press, Aug. 26, 1986, § Domestic News (available on NEXIS)	10
"Local NAACP Board Votes to Boycott White Merchants," Associated Press, May 29, 1986, § Domestic News (available on NEXIS)	10
N.Y. Times, Oct. 10, 1986, at A14, col. 3	10
Platt's Oilgram News, § United States, vol. 64, no. 161, at 3	10
"Store Boycott Spurs Constitutional Fight," L.A. Times, May 23, 1986, Part 1, at 19, col. 1	10
United Press International, Apr. 16, 1986, § Regional News (available on NEXIS)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1798

PENNZOIL COMPANY,

Appellant,

v.

TEXACO, INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

INTEREST OF AMICUS CURIAE

Amicus Curiae National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality and social and economic justice in this country. To promote these ends, the NAACP and its members engage in activity protected by the United States Constitution, including petitioning the government for the redress of grievances, marching and demonstrating in peaceful fashion, alerting the community to instances of discrimination, and advocating and organizing concerted action to influence

the political process and to spur social change. At times, these activities have met with legal action and threats of legal action in state courts. The NAACP has no fear of such legal action so long as the doors of the appellate courts—including this Court—are open to it to vindicate its rights. But if the NAACP were required to post a substantial supersedeas bond in order to gain effective access to the appellate process, it would not be able to do so; neither would many other public interest organizations, small businesses, or most ordinary citizens. It is for that reason that the NAACP is filing a brief in this case.

The NAACP has had first-hand experience with the effect of an unreasonable supersedeas bond on the appellate process. As a result of boycott activities subsequently held by this Court to be conduct protected by the First Amendment, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), a Mississippi trial court assessed damages against the NAACP in excess of $1 million. Mississippi law required the posting of a supersedeas bond equal to 1¼ times the amount of the judgment in order to stay immediate execution of that judgment pending appeal. Because the NAACP could not meet this bond requirement and because immediate execution of the judgment would have bankrupted the organization, the NAACP sought limited relief in federal court from Mississippi's bond requirements, claiming that the application of those requirements effectively deprived the NAACP of its constitutional rights. Had the federal courts not stayed the application of the bond requirements by enjoining enforcement of the judgment pending appeal to the Mississippi Supreme Court and thereafter to this Court, *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied sub nom. Claiborne Hardware Co.* v. *Henry*, 444 U.S. 1074 (1980), the NAACP would not have survived as an organization and could not have vindicated its First Amendment rights in this Court.

The narrow question in this case is whether the Second Circuit correctly determined that Texaco was entitled to similar relief from the Texas supersedeas bond. But in urging that Texaco is not entitled to such relief, Pennzoil makes two broad claims which threaten vital interests of the NAACP and which it therefore addresses in this brief. First, Pennzoil appears to contend that a state's supersedeas bond requirements can *never* be found unconstitutional as applied, even where they effectively preclude a defendant from seeking meaningful appellate review—including review by this Court. Second, Pennzoil contends that, in any event, a state-court defendant may *never* challenge the constitutionality of a state's bond requirements in a federal court.

For the reasons explained below, acceptance of Pennzoil's broad claims would unfairly and unconstitutionally deprive numerous state-court defendants of a meaningful opportunity to vindicate their federal constitutional rights. The NAACP therefore urges the Court to make clear that, whatever relief may or may not be due Texaco in this case, there *are* certain circumstances in which a state's supersedeas bond requirements violate Due Process rights, and there *are* certain circumstances in which a state-court defendant may choose to vindicate those rights in a federal court. The purpose of this brief is to describe those circumstances.

This amicus curiae brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Due Process precludes a state from imposing supersedeas bond requirements that are so oppressive that they effectively deny a litigant access to the state's appellate courts and, thereafter, access to this Court. Even if Due Process does not preclude such bond requirements

as to all litigants, it must preclude them as to involuntary state-court defendants whose only available process is appellate review. At a bare minimum, where fundamental constitutional rights are at issue, a litigant cannot constitutionally be denied access to state appellate courts through application of an oppressive supersedeas bond.

Federal actions attacking the constitutionality of a state's bond requirements are collateral to and wholly separate from the merits of the underlying state-court litigation. Such actions serve the limited purpose of ensuring fair access to the state appellate courts. A litigant—particularly an involuntary state-court defendant—has the choice under 42 U.S.C. § 1983 (1982) to bring such a collateral constitutional attack in a federal forum. Far from interfering with ongoing state-court adjudication, such limited federal actions ensure that meaningful state-court adjudication will in fact occur and that relief from this Court will thereafter be available.

Even if the Court overturns the relief granted Texaco in this case, it should make clear that a state cannot constitutionally impose oppressive bond requirements that effectively preclude appellate review, particularly where fundamental rights are at issue; it should also make clear that a litigant is entitled to choose a federal forum in which to attack the constitutionality of such state requirements.

ARGUMENT

I. A State May Not Constitutionally Prohibit Meaningful Access To Its Appellate Courts Through Imposition Of An Oppressive Supersedeas Bond Requirement

The NAACP acknowledges, of course, that the states are not constitutionally required to provide appellate court review of their trial courts' judgments;[1] on the other hand, it is well-settled that whatever appellate review the states *do* provide must meet the requirements of Due Process.[2] The NAACP also acknowledges that Due Process is not necessarily offended by the requirement of a reasonable supersedeas bond in connection with a stay granted to a losing party pending appeal; indeed, such a bond fairly serves to protect the prevailing party during the appeal process.

But a bond that is so oppressive upon the appealing party that it effectively *precludes* meaningful review—and is out of all proportion to any necessary protection of the previaling party's interest—necessarily violates Due Process. In the *Henry* case, for example, the NAACP would have been bankrupted had it been forced to comply with Mississippi's supersedeas requirements. 595 F.2d at 299-300, 305. Such draconian requirements prevent review as effectively as a rule that simply prohibits appeal altogether and should therefore be held violative of Due Process.

Any other conclusion would contradict a fundamental precept of our system of jurisprudence—that no party should be precluded access to the courts by virtue of

---

[1] *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972).

[2] *See Evitts* v. *Lucey*, 469 U.S. 387, 400-01 (1985). Similarly, even if the state is not required to provide mechanisms for suspension of judgments pending appeal, *see Louisville and Nashville R.R.* v. *Stewart*, 241 U.S. 261, 263 (1916), having provided such mechanisms the state must comply with the requirements of Due Process and Equal Protection in permitting litigants to employ those procedures.

unreasonable requirements which it cannot meet. Under that standard, Texaco may be entitled to be free of the Texas bond requirements for the same reasons that the NAACP was entitled to be free of the Mississippi bond requirements in the *Henry* case. The important point is that a supersedeas bond is offensive to Due Process whenever it imposes unreasonable, oppressive, and unnecessary requirements as the price of an appeal, no matter the relative wealth or poverty of the would-be appellant. As this Court stated in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), "[j]ust as a generally valid notice procedure may fail to satisfy due process because of the circumstances of [a particular] defendant, so too *a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.*" *Id.* at 380 (emphasis added).

While we believe the principle recognized in *Boddie* should be controlling in this case, certain decisions subsequent to *Boddie* suggest that the Due Process right to be heard may be appropriately limited to (1) circumstances in which the party has no remedy other than the judicial forum, or (2) circumstances in which the underlying issue on which the party wishes to be heard involves a "fundamental" right. Thus, in *United States* v. *Kras*, 409 U.S. 434 (1973), the majority explained that "*Boddie* was based on the notion that a State cannot deny access, simply because of one's poverty, to a 'judicial proceeding [that is] the *only effective means of resolving the dispute at hand.*'" *Id.* at 443 (quoting *Boddie*, 401 U.S. at 376) (emphasis added).[3] In addition, the *Kras* major-

[3] Kras, an indigent allegedly unable to pay the filing fee required for a voluntary petition in bankruptcy, was thought *not* to have a Due Process right of access to the courts because he had alternative non-judicial avenues of relief. *Boddie*, on the other hand, involved indigent parties seeking a divorce, a remedy available to them only in court. Comparing these two situations, the *Kras* majority stated:

> In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relation-

ity thought a debtor's interest enjoyed less Due Process protection than the interest at issue in *Boddie*:

> Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. *See Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969). Neither does it touch upon what have been said to be the suspect criteria of race, nationality, or alienage.

409 U.S. at 446 (citation omitted).

By contrast, this Court more recently found unconstitutional Connecticut's requirement that the costs of blood tests used to disprove paternity be charged against an indigent defendant who could not afford the tests. Lacking those tests, the defendant was adjudged to be the father. *Little* v. *Streater*, 452 U.S. 1 (1981). In distinguishing the *Kras* and *Ortwein*[4] cases, this Court observed that

> [o]ur decisions in *Kras* and *Ortwein* emphasized the availability of other relief and the less "fundamental" character of the private interests at stake than those implicated in *Boddie*. *Because appellant*

---

ship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*.

Kras, 409 U.S. at 445.

[4] In *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), a majority of this Court determined that welfare recipients' Due Process rights were not violated by a state's requirement that they file a $25.00 fee in order to pursue a judicial appeal of agency determinations marginally adjusting their benefits. In so holding, this Court again relied upon the existence of non-judicial "alternatives, not conditioned on the payment of fees," through which the appellants had been able to seek relief. *Id.* at 659. The Court also noted that, as in *Kras*, the interest asserted by these welfare litigants was of less constitutional significance and was therefore entitled to fewer Due Process protections than that at issue in *Boddie*. *Id.* at 659.

> *has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to* Boddie *rather than to* Kras *and* Ortwein.

Id. at 16 n.12 (emphasis added).

There are several important implications of *Boddie* and its progeny for the present case. First, Pennzoil is clearly wrong to contend that an oppressive supersedeas bond can *never* offend Due Process, even where its imposition effectively and unreasonably denies a party the right to be heard.

Second, even if such a bond does not violate the Due Process rights of *every* would-be litigant who is unable to satisfy the bonding requirements, it surely does so in the case of an involuntary state-court defendant who has *no* alternative remedy or forum for his claim except the state's courts. In other words, a state may afford Due Process through different procedures or forums, but if the *only* process the state offers to a party for vindication of its claims is the courts, meaningful access to those courts must be afforded.[5] Thus, *every* involuntary state-court defendant—like the NAACP in

---

[5] As the Court stated in *Boddie*:

> [T]he successful invocation of this governmental power [the judiciary] by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and *the denial of defendants' full access to that process raises grave problems for its legitimacy.*

Boddie, 401 U.S. at 376 (emphasis added). The Court made this same point in *Streater*, in which it stressed that a *defendant* sued in state court for paternity payments had "no choice of an alternative forum" in which to vindicate his interests. *Streater*, 452 U.S. at 16 n.12; *see also Kras*, 409 U.S. at 444. Likewise, in *Ortwein*, 410 U.S. at 659-60, the Court stressed that appellants had been provided a hearing in a non-judicial forum, an alternative not conditioned on payment of a fee, in which the appellants were able to press their claims.

Henry and Texaco here—has a Due Process right that any state-created judicial appeal be free from an oppressive or impossible bond requirement that effectively denies that defendant a meaningful opportunity to be heard.[6]

The final implication of the *Boddie* line of cases—one that Pennzoil acknowledged in its Second Circuit brief but unfortunately ignores before this Court—is that *at a bare minimum* Due Process includes a right to be free of an oppressive bond where the merits of the appeal involve "fundamental rights."[7] While we do not believe that Due Process protections may be limited to certain "fundamental rights,"[8] nevertheless it is important that the Court *at the very least* reaffirm in this case the special procedural protection those rights enjoy.

The fundamental rights described in *Kras* involve numerous matters of great interest to the NAACP, including free speech, right to travel, and issues involving racial discrimination. 409 U.S. at 446. Hence, if the

---

[6] Relying on *Boddie*, *Kras*, and *Ortwein*, the Third Circuit in *Lecates* v. *Justice of the Peace Court No. 4*, 637 F.2d 898 (3d Cir. 1980), found unconstitutional as applied Delaware's requirement that an indigent defendant post a surety bond in order to secure a trial *de novo* in Superior Court following an adverse determination by a justice of the peace. In reaching that determination, the Court found critical the state-court defendant's lack of alternative avenues for relief. *Id.* at 908-09.

[7] Before the Second Circuit, Pennzoil effectively conceded that *Boddie* and its progeny indicate that a supersedeas bond cannot operate to deny an appeal asserting fundamental constitutional rights. Pennzoil contended, however, that Texaco's appeal implicated no such rights, leaving Texaco, like Kras and the *Ortwein* appellants, without Due Process protections. Brief for Appellant at 36 n.14; *Texaco* v. *Pennzoil*, 784 F.2d 1133 (2d Cir. 1986) (Nos. 86-7046, 86-7052).

[8] The justification for such line-drawing is certainly not in the Constitution. The Fourteenth Amendment broadly commands the states to afford parties Due Process in *every* situation in which it proposes to deprive them of life, liberty, or property; the Amendment nowhere limits the Due Process protection to cases involving "fundamental rights."

Court does nothing else in this case, it should make clear that the Constitution will not permit oppressive state bond requirements to undermine a right of appeal, at least where that appeal involves fundamental constitutional rights, as it did in *Henry*. Situations comparable to the facts involved in *Henry* are arising with some frequency,[9] and it is vital that the rule adopted here leave

---

[9] For example, quite recently the Mississippi chapter of the NAACP sponsored a boycott of white businesses and public schools in Indianola to respond to apparent racial discrimination in the local school system. United Press International, Apr. 16, 1986, § Regional News (available on NEXIS). State and local NAACP chapters are also involved in a boycott of white merchants in the prosperous suburb of Dearborn, Michigan, which excluded nearby blacks from a local park by means of a "residents only" rule, N.Y. Times, Oct. 10, 1986, at A14, col. 3; a boycott of Shell Oil products to protest that company's investment ties to South Africa, Platt's Oilgram News, § United States, vol. 64, no. 161, at 3; a boycott of white businesses in Baton Rouge, Louisiana, to protest allegedly racially motivated grievances lodged against a black school principal, "Local NAACP Board Votes to Boycott White Merchants," Associated Press, May 29, 1986 (available on NEXIS); and a school boycott in a rural Georgia district to protest the lack of minority teachers, "Lack of Black Teachers Sparks Rural Georgia School Boycott," Associated Press, Aug. 23, 1986, § Domestic News (available on NEXIS). The NAACP has also been sued for defamation for its criticism of a police officer for unnecessary brutality in effecting an arrest. *NAACP* v. *Moody*, 350 So. 2d 1365 (Miss. 1977).

In yet another example, three senior citizens seeking free access to a local community center for NAACP meetings staged a lawn-chair protest outside the mayor's drugstore to discourage business. The three were then arrested under a Mississippi anti-boycott statute enacted as a result of the civil rights actions at issue in *Henry*. "Lawn Chair Protesters May Be Back When It's Cooler," Associated Press, Aug. 26, 1986, § Domestic News (available on NEXIS); "Store Boycott Spurs Constitutional Fight," L.A. Times, May 23, 1986, Part 1, at 19, col. 1. After repeated arrests, the bond on one of the participants, the president of the local NAACP chapter, rose to $10,000, forcing the group to abandon the protest temporarily for financial reasons. Although the state Attorney General's office declined to prosecute, private civil action by the mayor remains possible. "Lawn Chair Protesters May Be Back When Its Cooler," Associated Press, Aug. 26, § Domestic News.

open the opportunity for parties to protect their access to the appellate courts in such cases.[10]

II. State Court Defendants Seeking To Vindicate Their Due Process Guarantee Of Access To A State Appellate Forum Are Entitled To Choose Either The Federal Or The State Court In Which To Pursue That Claim

Beyond its contention that an oppressive supersedeas bond can never violate Due Process, Pennzoil's primary argument in this appeal is that any attack on a supersedeas bond must be brought, if at all, in state court. This argument is premised on essentially three contentions, all of which are wrong and should be expressly rejected by the Court in this case: (1) that an attack on a supersedeas bond constitutes a prohibited "appeal" of a state court decision; (2) that in certain kinds of cases Congress did not intend a party to have the choice of a federal forum for its constitutional claims; and (3) that a state-court defendant must exhaust state-court remedies before going to federal court.[11]

First, contrary to Pennzoil's contention, any suit charging that a supersedeas bond unconstitutionally deprives a judgment debtor of access to a state appellate forum is *wholly collateral* to the merits of the underlying state litigation. As this Court indicated in *National Socialist*

---

[10] All of these situations present potential *Henry* problems. Inherent in any case in which the NAACP must defend a state court action for damages arising from its expressive activities is the potential for a crippling yet unconstitutional, judgment subject to immediate enforcement unless the NAACP posts an equally crippling supersedeas bond to preserve an appeal made virtually irrelevant by the bond itself. Each such case poses circumstances in which Pennzoil's position in this case could effectively preclude vindication of federal constitutional rights.

[11] Regarding the other elements of Pennzoil's argument (the state action issue, the Anti-Injunction Act, 28 U.S.C. § 2283, and *Younger* v. *Harris*, 401 U.S. 37 (1971)), the NAACP defers to and agrees with the Second Circuit's analysis. *See Texaco*, 784 F.2d at 1145-53.

Party of America v. *Village of Skokie*, 432 U.S. 43, 44 (1977), the issuance of a stay of judgment pending appeal constitutes a matter "separable from and collateral to" the merits of the judgment itself. This Court's holdings in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983) and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) are therefore inapplicable to such a collateral suit. Both *Rooker* and *Feldman* reflected attempts by unsuccessful state-court litigants to *relitigate* their constitutional claims in a federal court. By contrast, like Texaco in the instant case, the NAACP does not assert a right to review of state decisions by inferior federal courts. Instead, the NAACP wishes merely to preserve the opportunity to bring a collateral § 1983 action in the *first instance* in federal court—an action designed to do no more than protect access to the state forum and, if necessary, to this Court.

Second, again contrary to Pennzoil's position, the right of a § 1983 claimant to bring its Due Process "access" claim in the first instance in a federal forum is firmly established in § 1983 jurisprudence. Discussing the legislative history of § 1983, this Court in 1982 stated that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Patsy* v. *Board of Regents*, 457 U.S. 496, 503 (1982) (citing *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).[12] Indeed, this Court has stated that

---

[12] This Court has given exhaustive consideration to the legislative history of § 1983 on numerous occasions, noting repeatedly Congress' intent to accord a claimant the choice of forum. *See, e.g., Patsy*, 457 U.S. at 506; *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961) (observing that the federal action is independent of and supplementary to any state remedies).

> [t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964) (emphasis added) (footnote omitted). Pennzoil's contention that a state-court defendant has no choice to bring its collateral federal claim in a federal court is simply wrong.[13]

Finally, Pennzoil's suggestion that a state-court defendant must in any event take its federal claim *first* to state court is not only wrong, but it deceptively implies that a party could *thereafter* go to federal court with the same claim. This Court has held conclusively that state remedies need not be exhausted before § 1983 claimants can present their claims for federal adjudication. *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982); *Steffel* v. *Thompson*, 415 U.S. 452 (1974).[14] Moreover,

---

[13] Pennzoil makes a related contention that is also wrong—that a defendant wishing to stay a state-court judgment has no need to bring a collateral federal action, but has only to seek a stay in the state appellate system and thereafter from this Court. *See* Brief for Appellant at 37-38 n.34 and accompanying text. This Court squarely rejected this contention in *England*:

> It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review, even when available by appeal rather than only by discretionary writ of certiorari, *is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts.*

Id. at 416 (emphasis added) (citations omitted).

[14] As this Court stated:

> "When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or

while urging that exhaustion be required in this case, Pennzoil fails to acknowledge that such exhaustion would thereafter deprive § 1983 claimants of access to a federal forum under principles of *res judicata*.[15]

In short, if Pennzoil were correct, a state-court defendant would have to bring its collateral attack on a supersedeas bond in state court and, having done so, would be precluded from thereafter bringing that attack in federal court. This is not the law and is plainly not what Congress intended in adopting § 1983. Rather, Congress intended that *all* claimants be permitted the choice of a single forum—either state or federal—in which to bring their federal claims. In this case, Texaco chose a federal forum in which to bring its collateral constitutional claim.[16] Pennzoil is wrong to think that it had the power to take that choice away merely by suing Texaco in a state court. The NAACP—to whom such a choice has often been and will continue to be of great importance—urges the Court to affirm Texaco's right to choose.

---

administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."

Patsy, 457 U.S. at 500 (quoting *Steffel*, 415 U.S. at 472-73).

[15] In *Allen* v. *McCurry*, 449 U.S. 90 (1980), the Court held that traditional principles of issue preclusion prevent a litigant from relitigating in a federal action § 1983 issues fully and fairly adjudicated in previous state-court proceedings.

[16] Indeed, the Second Circuit found that, in the circumstances of this case, the state forum would not have afforded Texaco a fair and timely opportunity to present its constitutional claim. 784 F.2d at 1144-45.

CONCLUSION

For the reasons discussed above, amicus curiae National Association for the Advancement of Colored People urges this Court to affirm Texaco's choice of a federal forum and, should it find that Texaco's supersedeas requirements were so oppressive as to deny Texaco a meaningful opportunity for appellate review, to affirm the limited stay relief granted below.

Respectfully submitted,

DAVID S. TATEL *
ALLEN R. SNYDER
WALTER A. SMITH, JR.
BRADLEY SAXTON
DEBORAH J. JEFFREY
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amicus Curiae National Association for the Advancement of Colored People

GROVER G. HANKINS
General Counsel
National Association for the Advancement of Colored People
4805 Mount Hope Drive
Baltimore, MD 21215
(301) 358-8900

* Counsel of Record

(8)

No. 85-1798

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

PENNZOIL COMPANY
Appellant,

v.

TEXACO INC.
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

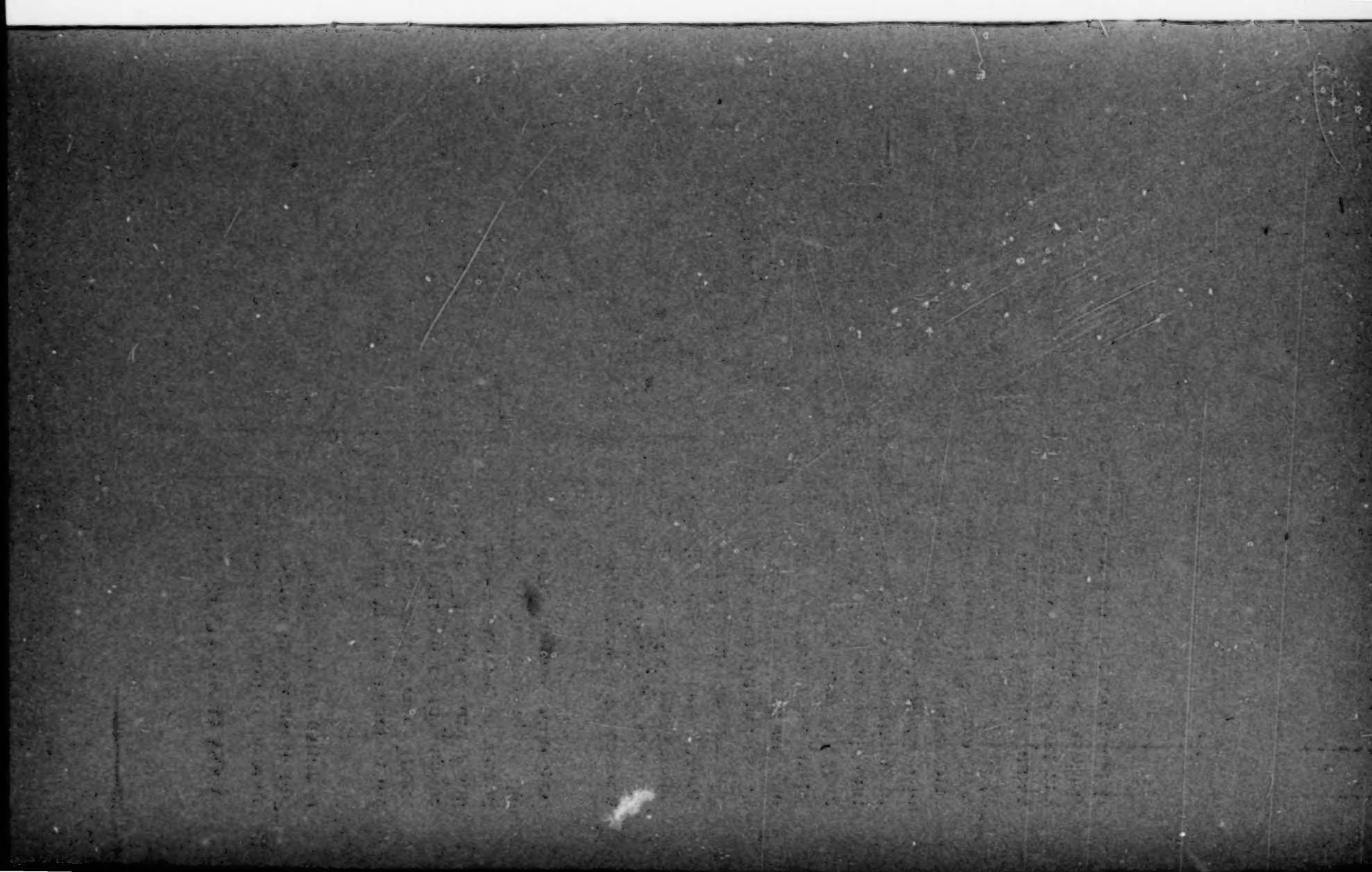
AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF APPELLEE

HAROLD M. BROWN
Attorney General
RONALD W. LORENSEN*
Deputy Attorney General
1031 West 4th Avenue
Suite 200
Anchorage, Alaska 99501
(907) 276-3550

Attorneys for Amicus Curiae
The State of Alaska

**Counsel of Record*

4PP



AMICUS CURIAE BRIEF OF THE STATE OF ALASKA

This amicus curiae brief is submitted on behalf of the State of Alaska. Alaska appears here to express its interest in this case and support for Appellee, and to briefly state the nature of that interest and support.

Alaska filed an amicus curiae brief in this matter in the United States Court of Appeals for the Second Circuit. There, as here, Alaska expressed its belief that, under the unique circumstances presented by this case, the District Court's action was a modest, legitimate and necessary exercise of federal jurisdiction. The injunction furthered, rather than upset, the delicate balance of our federal system. It was, moreover, clearly in the public interest.

As a sovereign state, Alaska would view with concern actual intervention by a federal court in an ongoing state court proceeding. For the reasons articulated by the Second Circuit, however, we do not believe that such is the case here. Moreover, this litigation is unusual in that it presents the very real possibility of a serious dispute *among* the states themselves. In the Texas Court of Appeals, the states of New York and Delaware—whose commercial and corporate laws, respectively, govern this dispute—took the extraordinary step of filing amicus curiae briefs demonstrating that the Texas trial court misapplied the laws of those states. This apparent violation of both general comity principles and the Full Faith and Credit Clause of the Federal Constitution was sufficiently troublesome to prompt several other states, including Alaska, to join New York and Delaware as amicus curiae in the Texas Court of Appeals. By preserving the status quo, the District Court's injunction had the salutary effect of better insuring that this substantial interstate controversy would ultimately be resolved correctly and in due course by the Texas appellate courts and, if necessary, by this Court.

In his amicus brief to the Texas Court of Appeals, the Attorney General of New York asserted unequivocally that the trial court misapplied New York law regarding the tort of wrongful interference with contractual relations. Delaware, in turn, asserted equally unequivocally that the trial court misapplied applicable Delaware law regarding the fiduciary obligations of Getty's directors. The problem is aggravated here by the nature of the state laws at issue. New York, for example, is our nation's center of commerce, and its body of commercial law has been developed with care, based upon a breadth of experience unique to that state. In developing its case law regarding wrongful interference with contractual relations, the New York courts have been required to balance carefully the interests of free competition and contractual certainty. In turn, contracting parties—such as Texaco here—have come to rely upon the guidelines of New York law in tailoring their competitive conduct. A misapplication of New York commercial law, then, affects not only the interests of the states in the proper functioning of our federal system, but also upsets the ground rules under which our nation's commerce flows. In these special circumstances, the federal judiciary plays an appropriate institutional role in protecting those interests. *See Maryland v. Louisiana,* 451 U.S. 725, 735-45 (1981); *North Dakota v. Minnesota,* 263 U.S. 365, 372-73 (1923).

The District Court's injunction also protected Alaska's economic interest in this litigation. Alaska is heavily dependent upon the oil industry, and upon active competition within that industry. This past year, 84% of Alaska state revenues came from royalties and taxes paid by the oil industry. Moreover, as production from Prudhoe Bay declines in the coming years, Alaska will look to new discoveries of oil and gas to fill that void. The impairment of any producer's ability to aggressively explore for and develop oil and gas in Alaska will have a negative impact upon our state. And, without question, the bankruptcy or dismemberment of Texaco—the likely consequence of reversing the District Court's injunction—would lessen both existing competition and new exploration.

The interests of the states, and of the public, in affirming the decision below are overwhelming. For these reasons, the affected states themselves have taken the unusual step of assuring this Court that, under the unique and exigent circumstances of this case, their rights as sovereigns were not impaired by the injunctive relief granted and affirmed below.

For these reasons, the State of Alaska respectfully submits that the decision of the United States Court of Appeals for the Second Circuit in this matter be affirmed.

Date: November 4, 1986

Respectfully submitted,

HAROLD M. BROWN
Attorney General

RONALD W. LORENSEN*
Deputy Attorney General
1031 West 4th Avenue
Suite 200
Anchorage, Alaska 99501
(907) 276-3550

Attorneys for Amicus Curiae
The State of Alaska

* *Counsel of Record*

(9)

No. 85-1798

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATES OF ALABAMA, DELAWARE, FLORIDA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WASHINGTON and WYOMING

ROBERT T. STEPHAN
(Counsel of Record)
Attorney General
WAYNE E. HUNDLEY
First Deputy Attorney General
State of Kansas
Kansas Judicial Center (2nd Floor)
301 West 10th Street
Topeka, Kansas 66612
(913) 296-2215

[List of Additional Counsel on Inside Cover]

68 pp

CHARLES A. GRADDICK
Office of the Attorney General
Alabama Statehouse
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7406

CHARLES M. OBERLY, III
Department of Justice
Carvel State Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-2427

JIM SMITH
Department of Legal Affairs
The Capitol-Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

WILLIAM J. GUSTE, JR.
Louisiana Department of Justice
234 Loyola Avenue, 7th Floor
New Orleans, Louisiana 70112
(504) 568-5575

HUBERT H. HUMPHREY, III
Capitol Building, Room 102
Aurora Avenue
St. Paul, Minnesota 55155
(612) 297-4272

WILLIAM L. WEBSTER
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

TED SCHWINDEN
Capitol Station
Room 204
Helena, Montana 59620
(406) 444-3111

TONEY ANAYA
State Capitol
Santa Fe, New Mexico 87503
(505) 827-3000

ROBERT ABRAMS
Room 47-24
Two World Trade Center
New York, New York 10047
(212) 488-3710

MICHAEL TURPEN
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

KENNETH O. EIKENBERRY
Temple of Justice
Olympia, Washington 98504
(206) 753-6207

ARCHIE G. MCCLINTOCK
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6132
(307) 638-6674

No. 85-1798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATES OF ALABAMA, DELAWARE, FLORIDA, KANSAS, LOUISIANA, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WASHINGTON and WYOMING

This *amicus curiae* brief is submitted on behalf of the States of Alabama, Delaware, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, New Mexico, New York, Okla-

homa, Washington and Wyoming. These states appear here to express interest in this case and support for the position of Appellee, and briefly to state the nature of that interest and support.

Texaco is an important corporate citizen of our states and the nation as a whole. The economic well-being of each of our states and of our citizens would be directly and adversely affected by the dismemberment of Texaco. Texaco's contribution to the economic well-being of each of our states—and of the nation as a whole—is considerable. Many of our citizens are present or retired employees of Texaco, owners of Texaco securities, or recipients of royalties from Texaco. Moreover, Texaco provides to each of our states significant tax revenues and constitutes an important presence in our states through its ownership of real property and other assets. Texaco also provides substantial indirect contributions to the economies of our states as a supplier of petroleum products and as a purchaser of goods and services.

We believe that a Texaco bankruptcy would inflict enormous harm on our states and citizens. If the $11 billion state court judgment were to be subjected to appellate review and affirmed, the damage to our states would be significant. If such damage were inflicted *before* appellate review, that would be especially tragic: our citizens could fairly wonder what kind of judicial system would permit the nation's sixth largest corporate enterprise to be forced into bankruptcy, causing tremendous damage beyond Texaco, on the basis of a trial court's judgment not subjected to full appellate review.

In reaching its decision to grant injunctive relief, the federal district court correctly recognized the public interest. We reaffirm to this Court the weight and strength of that interest. Texaco should not be forced to seek protection under the federal bankruptcy laws in order to prevent execution on the $11 billion judgment prior to exercising its right to appeal that judgment to the Texas appellate courts. The decision of the court below merely ensured that the Texas appellate courts'

review of the merits of the unprecedented judgment would be meaningful. Such review could not be meaningful if the judgment's enormous effects were inflicted on Texaco and the public before the judgment was final. For that reason, the decision of the court below should be affirmed.

The interest of our states is heightened by the fact that Texaco's appeal of the $11 billion judgment, currently proceeding in the Texas appellate courts, raises issues involving the laws and underlying policies of sister states (New York and Delaware), as well as federal law and policy, which are important to each of the sovereign states and, we believe, to our nation as a whole. Both New York and Delaware have taken the extraordinary step of filing *amicus* briefs in the Texas Court of Appeals and have minced no words in asserting that the trial court's judgment should be reversed because it was based upon significant misapplication of their law by the Texas trial judge. (The New York and Delaware briefs filed in the Texas Court of Appeals are annexed hereto as Appendix A and B respectively.) Seven other states (Alabama, Alaska, Kansas, Louisiana, New Mexico, Oklahoma and Wyoming) have also appeared in the Texas Court of Appeals to express concern over the apparent failure of the Texas trial judge properly to apply a sister state's law and the potential implications for interstate comity and commerce, and to urge reversal of the trial court's judgment.

Our states would be concerned as a matter of principle over any failure by a trial court in one state properly to apply the laws of a sister state because the principle of mutual respect is so profoundly important to the viability of our nation, composed as it is of 50 sovereign states. The extraordinary level of concern warranting the participation of our states as *amici* in the litigation between Texaco and Pennzoil is the result of two factors.

First, New York State itself has taken the extraordinary step of appearing as *amicus* in the state appellate proceedings to contend that its substantive commercial law, and the policies

underlying that law, were misapplied by the Texas trial judge.[1] The importance of New York commercial law is not confined to New York. New York is a commercial center, and, as a result, business transactions throughout the nation are governed or affected by its commercial law. Other states, and our nation as a whole, have historically looked to New York for leadership in the development of commercial law, and most states share with New York common legal concepts and policies regarding the regulation of commercial activity.

Although ours is a national economy, commercial activity is still primarily and rightfully regulated by state law. The multi-state character of many business transactions does not necessarily require or even justify federal legislation establishing national uniformity. It does, however, necessitate fair and clearly ascertainable state standards of conduct rationally developed and consistently applied by courts in all of the 50 states. The important role of states in the regulation of the national economy is preserved by the recognition and respect each state accords the applicable law of its sister states. In this case, New York's law apparently was not properly respected.

Similarly, Delaware contends that its laws governing the fiduciary duties of corporate directors were misapplied by the Texas trial court.[2] Delaware law governs the internal affairs of

---

[1] There was no dispute at the trial that the law of New York governed the substantive contract and tort law issues in the case. The New York brief concludes (at A-3):

> "Because the jury charge failed to include [proper] instructions and misstated numerous principles of New York law, the judgment of the trial court should be reversed."

[2] The law of Delaware was relevant to the issues presented in the Texas trial because of Texaco's contention that, even if (contrary to law and fact) Pennzoil had entered into a contract with Getty Oil Company prior to concluding a deal with Texaco, such a contract would have been a breach of fiduciary duty by the Getty directors, and therefore unenforceable. This is significant because, under New York law, one cannot be held liable for interference with an unenforceable contract, absent exceptional, egregious, wrongful conduct (*i.e.*

corporations across the nation and, as with the commercial law of New York, other states and our nation as a whole have long looked to Delaware for leadership in developing principles of corporate governance.

Second, in the absence of the relief granted by the courts below, the enormous harm arising out of what both New York and Delaware unequivocally contend was a misapplication of their law would have been irreversibly inflicted upon Texaco and the public without any appellate court having had the opportunity to consider the merits of those contentions. The judgment in this case is of such unprecedented magnitude that permitting the judgment creditor to execute or attach liens prior to appeal would in fact preclude full and meaningful judicial consideration of the profoundly important issues to be raised on appeal.

Unlike many cases implicating the appropriate limits of federal jurisdiction, the litigation between Texaco and Pennzoil, as it now stands, implicates issues of federalism other than the proper allocation of authority between state and federal institutions. If Texaco cannot obtain a full review of the judgment against it before that same judgment forces it into a bankruptcy, then our federal system—in which states are required and expected to respect each other's laws and policies —will not have functioned as intended. As a consequence, the

---

fraud) by the tortfeasor, which no one has ever claimed to be present here.

In his charge to the jury, the Texas trial judge (to use Pennzoil's own words) " 'advised the jury that the status of the Getty entities as fiduciaries was not relevant to the interference issue' ". (*See* the Delaware brief at B-4.) In its brief, Delaware asserts unequivocally (at B-4) that the Texas trial court's instruction to the jury concerning the Getty Board's fiduciary duties under Delaware law was "incorrect" and "constitutes plain error". Delaware states (at B-1) that it "has concluded that fundamental principles of Delaware law governing the fiduciary duties of directors of Delaware corporations have not been reflected properly in the judgment below".

benefits to our national economy that are secured by that system of mutual respect will needlessly be diminished.[3]

We understand and do not question the determination of the Texas legislature to provide for automatic supersedeas and lien procedures not requiring judicial oversight or intervention. Like Texas, several other states have similar supersedeas bond and judgment lien provisions which serve the purpose of protecting judgment creditors during the pendency of appeals. We also recognize, however, that there will be cases (albeit extremely rare) in which strict adherence to such procedures will produce results that are so irrational as to conflict with constitutional principles. Given the lack of any state interest in such strict adherence in a purely private dispute (not involving any state official or agency), we do not believe it to be an affront to state sovereignty for a federal court to deal with such rare cases in the manner that the court below has dealt with this case.

In this case, the Texas supersedeas bond requirement would, according to the findings of the district court, require Texaco to post a $13 billion bond (the amount of the judgment plus interest and costs)—a bond which no litigant could post because it exceeds by a factor of seven the estimated worldwide bonding capacity. In the absence of such a bond, Pennzoil

---

[3] In addition to the state law questions presented by the judgment, federal law questions are also raised. The judgment has already had an impact on those federal issues. The Wall Street Journal recently reported:

> "This 'post-Texaco' climate of uncertainty is having a chilling effect on bidding competition. Some companies, accustomed to vicious bidding wars in the mergers and acquisitions market, have grown gun-shy in the wake of the Texaco verdict, especially when a potential target has entered any type of agreement with a third party. Some boards of directors, meanwhile, have had to grudgingly accept lower bids for their companies' assets rather than risk being sued for breach of contract by an angry bidder." (WSJ 4/15/86 at 1, 17)

The federal, as well as the state, issues deserve full review before Texaco is forced into bankruptcy.

could seek to execute upon the judgment. Moreover, even if such a bond could be posted, Pennzoil would be entitled under the Texas lien statute to impose liens on Texaco's assets in the full amount of the judgment. Importantly, the execution on the judgment or imposition of judgment liens would occur without any state official exercising discretion as to whether such result would be appropriate or in the public interest.

The district court found that the threat of immediate execution on the judgment or the imposition of judgment liens on Texaco's properties in Texas would force Texaco to seek protection under the United States Bankruptcy Code. The resulting disruption and harm would obviously extend beyond Texaco to irreparably damage the individuals, organizations and states that are in one way or another dependent upon Texaco. The national interest would also be irreparably damaged. On the other hand, as the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full" and, indeed, the district court explicitly found that Pennzoil had conceded (and in fact repeatedly asserted) this point.

Under these circumstances, unmitigated application of the Texas lien and bond provisions would produce an irrational result. That does not mean that the Texas judgment security provisions, which, as noted, are similar in intent and form to the security provisions of several of our states, are unconstitutional or in need of amendment. Rather, it means only that relief can be sought and granted in the federal courts in very rare cases, such as the case now before this Court, (i) where the judgment arises out of purely private litigation in which no state official or agency is involved, (ii) where there is concededly no need for security in the magnitude required by the law, (iii) where the bonding capacity necessary to satisfy the requirement indisputably does not exist,[4] (iv) where the enforcement of the

[4] We do not read the decision below as requiring an affordable supersedeas bond for all litigants; indeed, the court below made very clear that it was not suggesting such a requirement.

security provisions is solely in the discretion of a private party, unchecked by any state official's exercise of discretion, and (v) where the irreparable damage that would result from the unmitigated application of the security provisions is devastating to both private and public interests.[5] The states have no interest in the irrational application of generally sound security provisions in a purely private lawsuit.

The decision below is not offensive to states. On the contrary, the federal injunctive relief is appropriate and carefully limited, and serves the interest of federalism by ensuring that the enforcement by a private party of one state's rules in an irrational manner does not harm the legitimate interests of other states and unnecessarily disrupt interstate commerce upon which all states and the nation as a whole depend. The federal injunction has had no adverse effect on the ability of the Texas appellate courts to review the judgment of the state trial court. Rather, it insured that state appellate review would be meaningful. Given the district court's findings that time was of the essence, that timely relief might not have been available in the state courts, that there would be no damage to Pennzoil if federal injunctive relief were granted and that, if such relief were not granted, Texaco and the public would be irreparably damaged, we firmly believe that the Second Circuit's decision was correct under the principles articulated in the relevant case law. To permit appellate review only at the expense of a bankruptcy filing by Texaco prior to complete appellate review—which in itself would result in significant federal intervention—would effectively thwart meaningful review of a judgment which no one can seriously argue should not be subjected to appellate scrutiny before its destructive consequences are unleashed, and would subject numerous states and their citizens to unnecessary and potentially severe disruption.

---

[5] We do not read the decision below as impinging upon the exercise of powers by state courts which states might have a significant interest in protecting, such as the power to punish contempt by a state court litigant.

We also believe that there are important state and national principles that would be undermined by the devastating consequences that would flow from Texaco's loss of the protection provided by the federal injunction. Among other consequences, the spectacle of a Texaco bankruptcy based on a Texas trial court's apparent failure properly to apply the laws of its sister states (New York and Delaware) might very well undermine respect for federalism and states' rights upon which our nation is based.

For these reasons, we urge that the decision of the United States Court of Appeals for the Second Circuit in this matter be affirmed.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General
(Counsel of Record)
WAYNE E. HUNDLEY
First Deputy Attorney General
State of Kansas

CHARLES A. GRADDICK
Attorney General
State of Alabama

CHARLES M. OBERLY
Attorney General
State of Delaware

JIM SMITH
Attorney General
State of Florida

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

WILLIAM L. WEBSTER
Attorney General
State of Missouri

TED SCHWINDEN
Governor
State of Montana

TONEY ANAYA
Governor
State of New Mexico

ROBERT ABRAMS
Attorney General
State of New York

MICHAEL TURPEN
Attorney General
State of Oklahoma

KENNETH O. EIKENBERRY
Attorney General
State of Washington

ARCHIE G. MCCLINTOCK
Attorney General
State of Wyoming

APPENDIX A

No. 01-86-00216-CV

IN THE

Court of Appeals

FOR THE

First Supreme Judicial District of Texas

TEXACO, INC.,
Appellant,

v.

PENNZOIL COMPANY,
Appellee.

ON APPEAL FROM THE 151ST DISTRICT COURT,
HARRIS COUNTY, TEXAS

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK*

ROBERT ABRAMS
Attorney General of the State of New York
Amicus Curiae
Room 47-24
Two World Trade Center
New York, New York 10047
(212) 488-3710

ROBERT HERMANN
Solicitor General of the State of New York.

COLVIN W. GRANNUM
Assistant Attorney General
Of Counsel

* Reprinted to comply with Supreme Court Rule 33.

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	A-1
SUMMARY OF ARGUMENT	A-2
ARGUMENT	A-4
I. THE SPECIAL ISSUES AND JURY INSTRUCTIONS FAILED TO DESCRIBE ACCURATELY THE ELEMENTS OF THE NEW YORK CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS	A-4
A. Introduction	A-4
B. Special Issue No. 1 And The Accompanying Jury Instructions Fail To Describe Accurately The Law Governing The First Element Of The Cause Of Action—The Existence of A Valid Contract	A-6
1. The Trial Judge's Refusal To Advise The Jury Of The Four-Factor "Intent" Test Constituted Reversible Error	A-6
2. The Jury's Affirmative Response To Special Issue No. 1 Does Not Establish That The Jury Believed That Pennzoil And The Gettys Entered Into A Valid Contract Effective January 3, 1984	A-9
3. The Jury Instructions Accompanying Special Issue No. 1 Are Defective For Additional Reasons	A-11
C. Special Issue No. 2 And The Accompanying Jury Instructions Fail To Describe Accurately The Additional Elements of the Cause Of Action For Intentional Interference With Contractual Relations	A-15
1. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect The Emphasis New York Law Places On Actual Knowledge Of The Contract	A-16

Page

2. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect New York's Focus On Improper Interference A-18

a. The Jury Should Have Been Instructed That An Agreement To Agree Or An Oral Contract For the Sale Of Securities Is Entitled To Protection From Interference Only Where Unlawful Means Are Used A-20

b. The Jury Should Have Been Instructed That Whether Texaco's Interference Was Proper Depends Upon Whether Its Conduct Was Reasonable In View Of All The Circumstances A-21

II. THE SPECIAL ISSUES AND JURY INSTRUCTIONS PERTAINING TO PUNITIVE DAMAGES WERE INADEQUATE A-24

III. CERTIFICATION OF THE DISPOSITIVE QUESTIONS OF NEW YORK LAW TO THE COURT OF APPEALS OF NEW YORK IS APPROPRIATE IF THIS COURT CONCLUDES THAT NEW YORK LAW IS UNCLEAR A-27

CONCLUSION A-28

TABLE OF AUTHORITIES

CASES: Page

AA Tube Testing Co. v. Sohne, 20 A.D.2d 639, 246 N.Y.S.2d 247 (2d Dept. 1964) A-16

Alvord & Swift v. Stewart M. Muller Constr. Co., 46 N.Y.2d 276, 413 N.Y.S.2d 309 (1978) A-4, A-15

American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (S.D.N.Y. 1971) A-17

Anthony v. George T. Bye, Inc., 243 A.D. 390, 277 N.Y.S. 222 (1st Dept. 1935) A-25

Banking & Trading Corp. v. Floete, 257 F.2d 765, 769 (2d Cir. 1958) A-7

Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d 397, 393 N.Y.S.2d 350 (1977) A-7, A-11

Candid Productions, Inc. v. International Skating Union, 530 F. Supp. 1330 (S.D.N.Y. 1982) A-9, A-11, A-13

Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d Cir. 1949) A-18

Dickson v. Mitchell, 87 A.D.2d 697, 448 N.Y.S.2d 861 (3d Dept. 1982) A-9

Entertainment Events, Inc. v. MGM, No. 74 Civ. 2959 (S.D.N.Y. May 31, 1978) A-16, A-17

Gravitt v. Newman, ____ A.D.2d ____, 495 N.Y.S.2d 439 (2d Dept. 1985) A-25

Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980) A-4, A-5, A-14, A-19, A-20, A-21

Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 67 A.D.2d 658, 412 N.Y.S.2d 623 (1st Dept. 1979), *modified on other grounds*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980) A-25

International Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49 (2d Cir. 1979) A-8, A-9, A-12

Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir. 1972) ... A-12

Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956) A-4, A-6, A-13

	Page
Huschle v. Battelle, 33 A.D.2d 1017, 308 N.Y.S.2d 235 (1st Dept. 1970)	A-25
Kelly v. Central Hanover Bank & Trust Co., 11 F. Supp. 497 (S.D.N.Y. 1935), *rev'd on other grounds*, 85 F.2d 61 (2d Cir. 1936)	A-17
Kleinschmidt Div. of SCM Corp. v. Futuronics Corp., 41 N.Y.2d 972, 395 N.Y.S.2d 151 (1977)	A-13
Optivision, Inc. v. Syracuse Shopping Center, 472 F. Supp. 665, 685 (N.D.N.Y. 1979)	A-20
Phillipson v. Hexalon Real Estate, Inc., 111 A.D.2d 126, 489 N.Y.S.2d 506 (1st Dept. 1985)	A-25
Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd., 519 F. Supp. 118 (S.D.N.Y. 1981)	A-7, A-9, A-10
Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), *cert. denied*, 105 S.Ct. 110 (1984)	A-8, A-9, A-12
R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984)	A-7, A-8
Rossi v. Kelly, 96 A.D.2d 451, 465 N.Y.S.2d 1 (1st Dept. 1984)	A-5
Rudoff v. Huntington Symphony Orchestra, 91 Misc. 2d 264, 397 N.Y.S.2d 803 (Sup. Ct. App. Tm. 1977)	A-22
Scheck v. Francis, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970)	A-7
Schwartz v. Greenberg, 304 N.Y. 250, 107 N.E.2d 65 (1952)	A-7
Susskind v. Ipco, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dept. 1975)	A-20
United Euram Corp. v. Occidental Petroleum Corp., 123 Misc. 2d 574, 474 N.Y.S.2d 372 (Sup. Ct. N.Y. Co. 1984)	A-5, A-22
V'Soske v. Barwick, 404 F.2d 495 (2d Cir. 1968)	A-12, A-13
Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S.2d 488 (1961)	A-25
Willmott v. Giarraputo, 5 N.Y.2d 250, 184 N.Y.S.2d 97 (1959)	A-9, A-13

Page

Winston v. Mediafare Entertainment Corporation, 777 F.2d 78 (2d Cir. 1985) A-7, A-11

STATUTES AND RULES:

New York

N.Y.U.C.C. §§ 2-204, 2-305, 2-310 (McKinney 1964) A-13

N.Y. Court of Appeals Rule 500.17, N.Y. Admin. Code tit. 22, § 500.17 (1986) A-27

OTHER AUTHORITIES:

1 A. Corbin, *Corbin on Contracts*, (1963) A-8, A-12, A-13

Freund & Easton, *The Three-Piece Suitor: An Alternative Approach to Negotiated Corporate Acquisitions*, 34 Bus. Law. 1679 (1979) A-12

New York Pattern Jury Instructions—Civil, (2d ed. 1974) A-5, A-11, A-16, A-24

Restatement (Second) of Torts, (1977)..... A-4, A-14, A-19, A-20

W. Prosser & W. Keaton, *Torts*, § 129 (5th ed. 1984) A-14, A-19, A-20

2 Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* 1584-86 (1968) A-12

No. 01-86-00216-CV

IN THE

Court of Appeals

FOR THE

First Supreme Judicial District of Texas

TEXACO, INC.,
Appellant,

v.

PENNZOIL COMPANY,
Appellee.

ON APPEAL FROM THE 151ST DISTRICT COURT,
HARRIS COUNTY, TEXAS

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Interest of *Amicus Curiae*

The State of New York, by its Attorney General, Robert Abrams, submits this brief as *amicus curiae.*

New York is one of the financial capitals of the world. It is certainly home to many of the largest, most complex financial transactions, and it is the marketplace of a staggering volume of commercial activity.

Courts located in New York, both state and federal, repeatedly are called upon to resolve a wide variety of business disputes. Predictably, New York caselaw has played a substantial role in the development of the law of commercial transactions. Business people and corporations doing business in New York commonly rely upon the law of New York when negotiating and consummating their contracts. They have come to expect their conduct to be judged by the standards upon which they historically have relied. The State of New York's interest in affirming those expectations and in the orderly development and application of the law of commercial transactions and commercial torts is substantial.

Beyond New York's general interest in the orderly development of commercial law, this case—involving, as it does, how control of great corporations may be bought and sold—has enormous significance for the business community and the economy of the State. It is undisputed that the legal import of the parties' conduct here must be measured by the law of New York. Therefore, the outcome of this case will have a direct impact on how business people and corporations comport themselves while doing business in New York and, in turn, on the perception of the climate for doing business in New York.

Moreover, appellant, Texaco Inc., maintains its principal place of business in New York and is one of New York's largest private employers and most important corporate citizens. Accordingly, the Attorney General submits this brief in order to protect the various interests of New York and to assist the Court in reaching a just resolution of this matter.

SUMMARY OF ARGUMENT

The tort of intentional interference with contractual relations is neither well established nor familiar to the lay public. Therefore, given the extraordinary nature of this case, the trial judge should have expended special care in charting what to the jury were unfamiliar waters: the purpose of the tort, the interests it seeks to protect, and its legal elements—all under the law of a distant state.

The special issues and jury instructions failed to achieve any of those goals. The special issues did not formulate material, ultimate facts under New York law. Instead, they served to mislead the jury. The jury instructions failed to describe the pertinent New York law accurately and to assist the jury in determining whether, under all the circumstances, Texaco's actions constituted improper interference with a legally cognizable interest of Pennzoil.

More specifically, in view of all the circumstances—especially the disputed evidence regarding the existence, validity, and enforceability of Pennzoil's alleged interests—the jury should have been instructed that an agreement to agree or an oral contract for the sale of securities is only entitled to minimal protection from interference by competitors. Likewise, the trial judge should have instructed the jury that even if it found that Pennzoil possessed an enforceable contract with the Getty-related entities, and that Texaco's actions interfered with that contract, it could nonetheless find that Texaco's interference was not improper and did not subject it to liability. Because the jury charge failed to include these instructions and misstated numerous principles of New York law, the judgment of the trial court should be reversed.

ARGUMENT

I

THE SPECIAL ISSUES AND JURY INSTRUCTIONS FAILED TO DESCRIBE ACCURATELY THE ELEMENTS OF THE NEW YORK CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS.

A. Introduction—The jury must determine whether the alleged tortfeasor's conduct was fair and reasonable under the circumstances in deciding whether, under the laws of New York, there was intentional interference with contractual relations.

To prevail on a cause of action for interference with contract, the plaintiff must establish five elements: (1) the existence of a valid contract, (2) the defendant's actual knowledge of that contract, (3) the defendant's intentional interference with the contract, (4) damages, and (5) defendant's improper action or lack of reasonable justification. *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 413 N.Y.S.2d 309 (1978); *see Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956). Although each of these factors is essential to a finding of liability, the test is not to be mechanically applied. Instead, except for those rare cases where liability is clear, proper application of these factors requires balancing the competing interests of the litigants and society as a whole.

In *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980), the Court of Appeals of New York unequivocally adopted the definition of interference with contracts given by the Restatement (Second) of Torts (1977). Speaking for the Court, Judge Hugh Jones quoted section 766 of the Restatement:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry)

> between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

50 N.Y.2d at 189, 428 N.Y.S.2d at 631. Judge Jones explained that "the keystone of the statement is the adverb 'improperly' . . . the definition of which is inconstant and mutable, drawing its substance from the circumstances of the particular situation at hand." *Id.*

The Restatement expressly supports the principle that an interferer is liable only for conduct judged improper in light of all the circumstances:

> The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

Section 767, comments b and j; *Guard-Life Corp. v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; 2 New York Pattern Jury Instruction Supplement ("2 NY PJI Supp.") 196; *see Rossi v. Kelly*, 96 A.D.2d 451, 465 N.Y.S.2d 1 (1st Dept. 1984); *United Euram Corp. v. Occidental Petroleum Corp.*, 123 Misc.2d 574, 474 N.Y.S.2d 372 (Sup. Ct. N.Y. Co. 1984). The determination of what constitutes reasonable justification under all the circumstances is generally to be decided by the jury. 2 NY PJI Supp. at 198.

This brief discusses the guidelines developed under New York caselaw to assist the trier of fact in determining whether the plaintiff possessed a contractual right and whether the defendant improperly interfered with it. We demonstrate that the trial judge failed to advise the jury of these guidelines. Accordingly, the Attorney General of the State of New York

submits that the jury charge was fatally defective and therefore he urges this Court to reverse the judgment of the trial court.

B. Special Issue No. 1 And The Accompanying Jury Instructions Fail To Describe Accurately The Law Governing The First Element Of The Cause Of Action—The Existence Of A Valid Contract.

1. The Trial Judge's Refusal To Advise The Jury Of The Four-Factor "Intent" Test Constituted Reversible Error.

Only claimants who establish that they possess a valid contractual right are entitled to broad legal protection from interference with that right. *See Israel v. Wood Dolson Co.* Alluding to this, the jury charge directed the jury to answer Special Issue No. 1.[1] Unfortunately, under New York's law of contract formation, that special issue did not address a material, ultimate fact. In addition, the jury instructions which accom-

---

[1] Special Issue No. 1 states:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

a. all Getty Oil shareholders except Pennzoil and the Sara C. Getty Trust were to receive $110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least $5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7ths basis

Answer "We do" or "We do not." _____ (footnote omitted).

pany the special issue do not accurately describe the law of contract formation as applied in New York.

Generally, New York permits parties to contract in the manner and form they choose. *See Scheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970). In determining whether a binding contract exists, it is necessary to examine "the objective manifestations of the intent of the parties." *Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp.*, 41 N.Y.2d 397, 400, 393 N.Y.S.2d 350, 352 (1977). In doing so, the trier of fact should assess the "totality" of the circumstances, including the parties' expressed words and deeds, their situations, and the objectives they were striving to obtain. *Id.* The aim is to allow the parties to realize their reasonable expectations. *See R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984); *Schwartz v. Greenberg*, 304 N.Y. 250, 107 N.E.2d 65 (1952).

Consistent with this approach, parties in New York are free to agree to enter into a binding contract without memorializing their agreement in a fully executed document. *See Winston v. Mediafare Entertainment Corporation*, 777 F.2d 78 (2d Cir. 1985). On the other hand, if the parties do not intend to be bound by an agreement until it is in writing and signed, then no contract arises until that event occurs. *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d at 74. The intent of the parties is controlling, unless it conflicts with other laws. *See Pinnacle Books v. Harlequin Enterprises, Ltd.*, 519 F. Supp. 118, 121-122 (S.D.N.Y. 1981).

Applying New York law, the courts have relied upon several factors to ascertain the intent of the parties: (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contracts; (3) whether all of the alleged contract terms have been agreed upon; and (4), whether the agreement at issue is the type of contract that is usually committed to writing. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d at 80; *Banking & Trading Corp. v. Floete*,

257 F.2d 765, 769 (2d Cir. 1958). The United States Court of Appeals for the Second Circuit has repeatedly emphasized that the last factor cited — usage and custom — should be weighed heavily. *See International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 57-58 (2d Cir. 1979) (Friendly, J., concurring); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d at 75; *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257 (2d Cir.), *cert. denied*, 105 S. Ct. 110 (1984). In this regard, the greater the complexity and importance of the transaction, the more likely that informal communications are intended to be only preliminary, especially where the parties have expressed an intention to execute a definite written agreement. *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 262; *see also* 1 A. Corbin, *Corbin on Contracts* § 30 at 105 (1963).

Despite a repeated, heavy reliance by the New York courts upon the four factors cited above (collectively referred to as the "*Winston* test"), the trial judge here, in charging the jury on whether the parties agreed to be bound absent a final, written agreement, refused to inform the jury of these considerations mandated by New York law (Transcript ("Tr.") 5220, 5225, 5227). Thus, the jury was denied the benefit of carefully developed legal guidelines on how the contract formation issue had to be decided consistent with the law of New York. The trial judge's refusal to advise the jury of these guidelines is reversible error.

Texaco argues that had the jury been informed of the *Winston* test, it would have reached a different verdict. Rather than restate Texaco's evidentiary arguments, we emphasize that there is sufficient evidence in the record to support the conclusion that the failure of the jury charge to apprise the jury correctly of the *Winston* test materially prejudiced Texaco's case. For example, references in the January 4, 1984 press releases to an "agreement in principle" that was "subject to the execution of a definitive merger agreement," and language in the draft definitive merger agreements which stated that the agreement was not to become effective until "after execution and delivery of the Agreement," support Texaco's argument

that Pennzoil and the Gettys expressly reserved the right not to be bound in the absence of their formal execution of a definitive merger agreement. *See Dickson v. Mitchell*, 87 A.D.2d 697, 448 N.Y.S.2d 861 (3d Dept. 1982).

Likewise, there was substantial evidence to indicate that the alleged agreement had not been partially performed and that complex material terms of the alleged contract remained open when Texaco submitted its bid on January 5, 1984. Perhaps most importantly, the jury could readily have concluded that Pennzoil and the Gettys did not intend to enter orally into a binding transaction constituting one of the largest, most complex mergers in corporate history. The jury could have found that without some unequivocal expression to the contrary, the established custom of consummating similar transactions in writing should prevail. *See International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d at 57-58 (Friendly, J. concurring); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d at 262.

2. The Jury's Affirmative Response To Special Issue No. 1 Does Not Establish That The Jury Believed That Pennzoil And The Gettys Entered Into A Valid Contract Effective January 3, 1984.

The wording of Special Issue No. 1 directs the jury to find that a contract existed if the Gettys and Pennzoil "intended to bind themselves to an agreement." The quoted language is ambiguous. It permitted the jury to find that a contract existed even if, in the jury's view, the Gettys and Pennzoil agreed only to negotiate further based upon the favorable tenor of their preliminary negotiations. This was reversible error

An informal agreement to agree does not constitute an enforceable contract under New York law. *See Willmott v. Giarraputo*, 5 N.Y.2d 250, 184 N.Y.S.2d 97 (1959); *Candid Productions, Inc. v. International Skating Union*, 530 F. Supp. 1330, 1333 (S.D.N.Y. 1982). Such an understanding is not enforceable legally because it does not set forth in "definite and certain terms every material element of the contemplated bargain." *Pinnacle Books v. Harlequin Enterprises, Ltd.*, 519 F.

Supp. at 121-22. Professor Corbin succinctly described the difference between an enforceable contract and an unenforceable "contract to contract":

> It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent documentary agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. The document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and *the so-called "contract to make a contract" is not a contract at all.*

1 A. Corbin, *Corbin on Contracts* § 29 at 84 (emphasis added).

It appears to be undisputed that at no time during their negotiations did the Gettys and Pennzoil agree on all the material terms of the purported merger agreement. In its brief, Texaco cites evidence to indicate that Pennzoil and the Gettys continued to negotiate material terms after January 4, 1985. For example, those parties never agreed on whether Getty Oil or Pennzoil would purchase the Getty Museum's shares. Acquisition of those shares was critical to the transaction contemplated by the parties. However, while negotiating the definitive merger agreement, they discovered that acquisition of those shares by Getty Oil, as contemplated in the Memorandum of Agreement drafted by Pennzoil, could subject Getty Oil to a $2 billion tax penalty. The trial record does not establish that this critical aspect of the alleged contract was ever resolved.

Significantly, neither Special Issue No. 1 nor the accompanying jury instructions mention the significance of agreement on the "material" terms to a contract. As noted, parties in New York, regardless of their intent, cannot bind themselves unless they have agreed on all material terms. *Pinnacle Books, Inc. v. Harlequin Enterprises*, 519 F. Supp. at 121; *Willmott v. Giarra-*

puto, 5 N.Y.2d at 253, 184 N.Y.S.2d at 98. Here, the framing of Special Issue No. 1 assumes that the three terms listed by the court are the material terms. This misled the jury as to its role. It was up to the jury to decide whether *any* of the listed terms was material, and likewise whether the listed terms were *all* of the material terms. The trial judge's decision to remove that fact-finding function from the jury placed him in the untenable position of rubber-stamping Pennzoil's formulation of the alleged material terms. In essence, he thereby created a new contract and imposed it upon the Gettys. *Candid Productions Inc. v. International Skating Union*, 530 F. Supp. at 1333.

3. The Jury Instructions Accompanying Special Issue No. 1 Are Defective For Additional Reasons.

Initially, we note with some reluctance that the jury instructions accompanying Special Issue No. 1 are, read as a whole, appreciably slanted in favor of Pennzoil's theory of the case. Jury instruction 4, for example, does not offer an explanatory statement of the law, but instead rebuts Texaco's contention that the alleged oral agreement between Pennzoil and the Gettys was too indefinite to be enforceable. Other instructions are fragmented and misstate New York law. Purporting to discuss the meaning of "intent to be bound," instructions 1, 2 and 3 fail to emphasize that the actual intent of the parties is dispositive.

Again, we stress that the *Winston* test, *Winston v. Mediafare Entertainment Corp.*, 777 F.2d at 80, would have provided essential assistance to the jury in reconstructing the parties' intent. At the very minimum, the jury should have been instructed to consider "all of the surrounding circumstances." NY PJI 4:1; *Brown Bros. Electrical Contractors v. Beam Constr. Co.*, 41 N.Y.2d at 400, 393 N.Y.S.2d at 352. Instead, instruction 2 erroneously limits the inquiry to an amorphous examination of "the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated *to each other* by their words and deeds." (emphasis added).

A full appreciation of the trade practice in a complex transaction involving mergers and acquisitions was crucial to a just disposition of the intent issue. *See Reprosystem B.V. v. SCM Corp.*, 727 F.2d at 262. Yet, the instructions given in this case contain not a single reference to trade practice, custom or usage. The jury was thus marooned. It was forced to deliberate in ignorance of the weight New York law accords to: (1) "the gap between the realities of the formation of complex business agreements and traditional contract formulation," *International Telemeter Corp.*, 592 F.2d at 57 (Friendly, J., concurring); (2) the usual sequence of events involved in complex merger-acquisition transactions, *see* 2 Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* 1584-86 (1968) (quoted in *International Telemeter Corp.*, 592 F.2d at 57 (Friendly, J., concurring)); (3) the use of the label "agreement in principle" as a term of art in tender offer transactions, Freund & Easton, *The Three-Piece Suitor: An Alternative Approach To Negotiated Corporate Acquisitions*, 34 Bus. Lawyer 1679, 1687-88 (1979); and (4) the credence, frequently "decisive," which the law accords to evidence of usage and custom. 1 A. Corbin, *Corbin on Contracts* § 30 at 105.

Jury instruction 4 was especially confusing and especially likely to be harmful because the requirement of contract formation which the instruction purports to address, *viz.* "definiteness," may be particularly difficult for jurors to grasp. This instruction failed to state that an enforceable agreement results only if parties have agreed on the essential terms of the bargain. *Interocean Shipping Co. v. National Shipping & Trading Co.*, 462 F.2d 673, 676 (2d Cir. 1972). It did not even convey the elementary concept that the intent of the parties is controlling. *See V'Soske v. Barwick*, 404 F.2d 495 (2d Cir. 1968).[2]

---

[2] Some cases contain broad statements which at first blush appear to conflict. On the one hand, many state that "if a material element of a contemplated contract is left for future negotiations, there is no contract."

(footnote continued)

The trial judge's linkage of Special Issue No. 1 with Jury instructions 5 and 6 also was erroneous. Those instructions pertain to post-contractual matters, *i.e.*, the duty to perform and the parties' option to agree to modify their existing contract. Linkage of these instructions with a special issue on contract formation could only have misled the jury.

Jury instruction 5 is defective for another reason. It implicitly advises the jury that an "agreement to agree" is enforceable, regardless of whether the parties agreed upon the essential terms of the prospective contract. As we have emphasized, this notion is contrary to New York law. *See Willmott v. Giarraputo; Candid Productions Inc. v. International Skating Union;* 1 A. Corbin, *Corbin on Contracts* § 29 at 84.

The first element of intentional interference with contractual relations requires a finding that a valid contract existed. *Israel v. Wood Dolson Co.* Here, the jury charge purported to address whether a contract existed, but failed to include the requirement that the contract be valid. Citing federal and state laws, Texaco argued that the alleged oral contract between the Gettys and Pennzoil was void or voidable. Texaco's arguments clearly were non-frivolous. Nonetheless, the trial judge refused to advise the jury that a valid contract was a prerequisite to recovery for intentional interference with it.

Willmott v. Giarraputo, 5 N.Y.2d at 253, 184 N.Y.S.2d at 97. Others indicate that a binding contract can be formed despite material open issues. *E.g.*, *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 395 N.Y.S.2d 151 (1977). As applied, these concepts are not at odds. Where the parties' conduct manifests assent to a basic agreement, their failure to work out every material term will not bar formation of a contract if a court may fill in "open" terms within the reasonable contemplation of the parties. *E.g.*, *V'Soske v. Barwick*. Courts usually derive such terms from trade custom or usage or course of dealing between the parties. E.g., Uniform Commercial Code §§ 2-204, 2-305, 2-310.

In a transaction such as the instant one, Texaco has argued forcefully that reasonable material terms should not be implied because of the uniqueness of the contract in terms of complexity and size.

The court's elimination of this element of the cause of action was significant. Under New York law, unenforceable contracts are allowed only minimal protection from interference, *see Guard-Life Corp. v. S. Parker Hardware Corp.* 50 N.Y.2d at 192, 428 N.Y.S.2d at 633; *see also* W. Prosser & W. Keeton, *Torts* § 129 at 996 (5th ed. 1984); Restatement (Second) of Torts § 767 at 34. Enforceable contracts are entitled to much greater protection. If properly instructed, the jury could have found that the alleged agreement here was entitled to the same amount of protection as are "precontractual relations" or a voidable contract, *i.e.*, no protection at all or protection only from interference by "wrongful means." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d at 196; 428 N.Y.S.2d at 636. Instead, the jury was wrongly led to believe that the mere existence of some kind of a contract, whether valid or not, fully satisfied the first element of intentional interference with contract.

In sum, the special issue and jury instructions effectively diluted the legal requirement of a jury finding that the parties intended to be bound. Instead, the court discounted the formalities surrounding contract formation, without emphasizing the heightened significance that the issue of intent assumes where there are no such formalities. Reversible error occurred when the trial judge refused to instruct the jury (1) to apply the *Winston* intent test, (2) to examine the "totality of the circumstances," or (3) to accord great weight to trade practice, custom or usage pertaining to the formation of complex, merger-acquisition transactions.

Furthermore, Special Issue No. 1 and the instructions which accompany it muddled the distinction between a final, binding contract and an unenforceable agreement to agree. This distinction should have been sharply drawn because under New York law, as noted, the amount and kind of protection from interference afforded unenforceable contracts is substantially less than that granted to enforceable contracts. *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.* Nonetheless, the special issue invited the jury to find that an agreement

to agree or an agreement to negotiate further is enforceable, regardless of the number and the materiality of the terms which were left open.

In practical terms, the jury charge failed to inform the jury accurately how it should determine whether Pennzoil and the Gettys bound themselves contractually. As a result, the jury may well have concluded that the existence of an informal agreement, one which the parties hoped to turn into a contract, was a sufficient ground for finding that the parties "intended to bind themselves to an agreement." Indeed, Special Issue No. 1 effectively affords to preliminary negotiations that are positive in character virtually plenary protection from interference by a third party. Accordingly, the jury charge materially prejudiced Texaco and the judgment should be reversed.

C. Special Issue No. 2 And The Accompanying Jury Instructions Fail To Describe Accurately The Additional Elements Of The Cause Of Action For Intentional Interference With Contractual Relations.

The remaining elements of the cause of action pleaded by Pennzoil include defendant's knowledge of the contract, defendant's intentional interference with that contract, damages, and the impropriety of defendant's interference. *Alvord & Swift v. Stewart M. Miller Constr. Co.*, 46 N.Y.2d at 282, 413 N.Y.S.2d at 312. Ostensibly covering the "knowledge" and "intentional interference" elements of the tort, the trial judge propounded Special Issue No. 2:

> Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found.
>
> Answer: We do or we do not. ___(footnote omitted).

Even a summary perusal of the special issue reveals that it blurs the distinction between discrete elements of the tort, and replaces them with the ambiguous phrase "knowingly interfered."

1. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect The Emphasis New York Law Places On Actual Knowledge Of The Contract.

The jury instructions accompanying Special Issue No. 2 do not correct the inadequate formulation of that special issue. They compound it. Jury instructions 1 and 2, intended to describe the knowledge element of the tort, nowhere mention the term "actual knowledge". New York Pattern Jury Instruction 3:56 states, "Knowledge means *actual awareness*, but the knowledge need only be of the existence of the contract, not of its detailed terms." NY PJI Supp. at 191 (emphasis added). Nonetheless, the language of jury instruction 2 suggests it is proper to impute knowledge to Texaco:

> In order to find that Texaco had knowledge of the agreement, if any, it is not necessary that Texaco had an accurate understanding of the legal significance of the facts which produced the agreement. If Texaco knew the facts that gave rise to the agreement, then it knew of the agreement, even if it did not believe that those facts gave rise to an agreement and even if it believed that any agreement that did exist violated the law. You may also find that Texaco knew of the agreement, if any, if you find that Texaco intentionally or willfully refused to ascertain the facts or if exercised bad faith. Texaco is also charged with all the knowledge, if any, of its agents and representatives, whether communicated to each other or not.

This was, at best, confusing, and more likely was misleading. Under New York law, the alleged tortfeaser must possess actual knowledge that it is interfering with the performance of a contract. *AA Tube Testing Co. v. Sohne*, 20 A.D. 2d 639, 246 N.Y.S.2d 247 (2d Dept. 1964). Imputed knowledge or constructive knowledge is insufficient to sustain the cause of action. *Id.* The alleged interferer's negligent failure to conduct a reasonable investigation does not subject him to liability unless such failure was motivated by ill will. *Entertainment Events, Inc. v. MGM*, No. 74 Civ. 2959 (S.D.N.Y. May 31,

1978); *Kelly v. Central Hanover Bank & Trust Co.*, 11 F. Supp 497 (S.D.N.Y. 1935), *rev'd on other grounds*, 85 F.2d 61 (2d Cir. 1936).

The leading cases discussing this element of the tort are clear: nothing less is required than actual knowledge of either the contractual right alleged to have been breached or the essential facts which give rise to that contractual right. *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971), involved an acquisition of the assets and business of a going concern. The defendant was told that a deal had been struck and was shown a purported letter agreement which appeared not to be binding due to lack of mutuality of obligation. Defendant did not ask about, nor was it informed of, the facts and circumstances of prior extensive negotiations between plaintiff and the selling defendants, including a prior oral agreement. Holding that the letter agreement did not put defendant on notice of a contract and that defendant was under no duty to investigate further, the court rejected a claim for inducement of breach of contract. The court stressed that "the intention to induce a party to 'breach' a contract that was not known to be a contract is a contradiction which cannot be implied." *Id.* at 608.

Similarly, in *Entertainment Events, Inc. v. MGM*, the court was asked to find that the defendant was aware of contract modifications to a licensing agreement which extended it and waived its termination provision. The court found that the defendant knew of the original licensing agreement, received a copy of it, and was advised that it was terminable at will. However, the court refused to hold that the actual knowledge element had been satisfied, concluding that the defendant was unaware of the specific facts or conduct which constituted a waiver of the right to terminate the contract at will. *Entertainment Events, Inc. v. MGM*, slip op. at 19-20. *Cf. Kelly v. Central Hanover Bank Trust*, 11 F. Supp. at 513 (actual knowledge not established where defendant's officer pledged stock with actual knowledge of outstanding debentures but

without knowledge of the restrictive covenants in those debentures).

Applying these principles, Texaco argues from the record that it did not have actual knowledge of the private, oral negotiations which Pennzoil alleges gave rise to a contract between it and the Gettys. Texaco further argues that, in any event, the information available did not contradict assurances by representatives of the Gettys that no binding agreement between Pennzoil and the Gettys existed. The court's charge diluted the actual knowledge requirement upon which Texaco properly relied in advancing these arguments. As a result, there is little doubt that the jury was improperly led to undervalue Texaco's evidence that it had no actual knowledge of a contract between Pennzoil and the Gettys.

Lastly, the interests of the public are best advanced by a strict application of the actual knowledge standard. A rule which holds business people liable for interfering with contractual provisions of which they lack knowledge would have a severe and undesirable deterrent effect on numerous socially beneficial business transactions. It would also run contrary to the principle of law that "one is not ordinarily held liable for consequences which one could not have anticipated." *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156 (2d Cir. 1949) (L. Hand, C.J.).

In sum, jury instructions 1 and 2 fail to emphasize the critical significance that New York law ascribes to the actual knowledge element. Instruction 2 spotlighted factors which would not preclude a finding of knowledge, and overshadowed the basic requirement that Texaco possess actual knowledge of the alleged contract between Pennzoil and the Gettys.

2. Special Issue No. 2 And The Accompanying Jury Instructions Do Not Reflect New York's Focus On Improper Interference.

Perhaps the most harmful defect in the jury charge is its failure to focus the jury's attention on whether Texaco's alleged interference was improper or without reasonable justification.

See Guard-Life Corp. v. S. Parker Hardware Mfg., 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; Restatement (Second) of Torts § 767; W. Prosser & W. Keaton, *Torts* § 129 at 983. As we demonstrate below, this error has two main components. First, the jury should have been advised that the tort of interference with contractual relations is defined in such a manner as to afford varying degrees of protection to different types of contractual relations. Secondly, the jury charge should have stated that even if Texaco knowingly interfered with an enforceable binding contract, the jury, after weighing all the circumstances, could reject Pennzoil's claim if it found Texaco's conduct was not improper.

In New York, flexibility is the hallmark of the cause of action for intentional interference with contractual relations. Because the cause of action implicates the competing private interests of the litigants as well as societal interests, it frequently requires of the fact-finder a delicate balancing of the nature and weight of all concerns involved. The New York Court of Appeals decision in *Guard-Life Corp. v. S. Parker Hardware Mfg.* adopts the factors listed in section 767 of the Restatement for determining whether an intentional interference with contract is "improper." 50 N.Y.2d at 190, 428 N.Y.S.2d at 632.[3] These factors include (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties, *Id.* The court charge here was defective in that it failed

---

[3] PJI 3:56 states in pertinent part:

An act (induces the breach, interferes with the performance) of a contract if it is a substantial factor in preventing the completion of the contract .... Whether such an act is improper depends upon whether the actor's conduct is reasonable, taking into consideration ([Use such of the following as are warranted by the evidence]: the means he employed, the contracts rights with which he interfered, the relation between him and the parties to the contract, the interest which he sought to advance or protect, the social interests involved.)

to inform the jury that, in determining whether Texaco was subject to liability under New York law, it must assess the propriety of Texaco's conduct and weigh the competing interests of the parties. We urge this Court so to hold.

a. The Jury Should Have Been Instructed That An Agreement To Agree Or An Oral Contract For The Sale Of Securities Is Entitled To Protection From Interference Only Where Unlawful Means Are Used.

"The interests of the other with which the actor's conduct interferes" is the third factor listed in section 767 of the Restatement. The overwhelming weight of authority, including New York caselaw and the Restatement, differentiates between interference with an existing contract and interference with prospective contractual relations. *See Guard-Life Corp. v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 190, 428 N.Y.S.2d at 632; Restatement § 768 comment a; W. Prosser & W. Keaton, *Torts* § 129 at 995.

An alleged interferer's status as a business competitor of the plaintiff does not sanction interference with an existing, enforceable contract. However, it may warrant interference with *prospective* contractual relationships, where the interference is primarily motivated by business competition, effects no unlawful restraint of trade, and does not employ wrongful means, *e.g.*, physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, or some degrees of economic pressure. *See Optivision, Inc. v. Syracuse Shopping Center*, 472 F. Supp. 665, 685 (N.D.N.Y. 1979); *Susskind v. Ipco*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dept. 1975); *but see* Jury Instruction 2 to Special Issue No. 2.

Likewise, under New York law, unenforceable or voidable contracts and contracts terminable at will are entitled only to the same protection from interference as are pre-contractual relations. *Guard-Life v. S. Parker Hardware Mfg.*, 50 N.Y.2d at 192, 428 N.Y.S. 2d at 633. (Void contracts are entitled to no protection. Restatement §§ 774, 766.) Unless the alleged

tortfeasor used wrongful means to interfere with an unenforceable or voidable contract, its action does not subject it to liability. *Id.*

Thus, jury instruction 3 is inaccurate. Under New York law, it is not—as was suggested to the jury—improper to interfere with (1) pre-contractual relations, (2) an unenforceable or voidable contract, or (3) a void contract by lawful means, such as "by persuasion alone, by offering better terms, by giving an indemnity against damage claims to the party or parties induced to breach, or by any act interfering with the performance of a legal duty arising from the agreement, such as the good faith duty of performance." Jury instruction 3. Nonetheless, the expansive language of the court's instruction did not permit the jury to distinguish among the different types of contractual relationships and the varying levels of protection afforded to each of them under New York law.

The jury should have been instructed that if it found there was only an agreement to agree or a void or voidable contract, that understanding was entitled to protection from interference only if wrongful means were used by Texaco. Because jury instruction 3 allowed the jury to conclude that an agreement to agree or an oral contract for the sale of securities is entitled to protection from interference by a competitor using lawful means, such as persuasion, to do so, it misstated New York law. This deficiency is particularly critical because, as is discussed hereafter, there does not appear to be any suggestion that Texaco used anything other than lawful means.

b. The Jury Should Have Been Instructed That Whether Texaco's Interference Was Proper Depends Upon Whether Its Conduct Was Reasonable In View Of All The Circumstances.

New York law condemns only "improper" interference with contractual relations even where a plaintiff has established the existence of a valid contract. *See Guard-Life Corp. v. S. Parker Hardware Mfg.* 50 N.Y.2d at 190, 428 N.Y.S.2d at 632;

United Euram Corp. v. Occidental Petroleum Corp. 123 Misc. 2d at 576, 474 N.Y.S.2d at 375; *Rudoff v. Huntington Symphony Orchestra,* 91 Misc. 2d 264, 397 N.Y.S.2d 803 (Sup. Ct. App. Tm. 1977); Restatement § 767, comment b. Inasmuch as the jury charge did not direct the jury to assess the propriety of Texaco's conduct, it failed to inform the jury of a key element of the alleged cause of action.

Addressing the first factor noted in section 767 of the Restatement—the nature of the actor's conduct—we know of no suggestion that Texaco used wrongful means to interfere with Pennzoil's alleged contract. At trial, Texaco indicated that in response to solicitations by the Gettys, it used only lawful means, such as persuasion, and the offering of better terms, and that its conduct violated no business ethics or customs. Similarly, as to the second factor, Texaco's motive, there is evidence in the record to support Texaco's contention that it was motivated solely by a business purpose, rather than by a desire to injure Pennzoil or interfere with its alleged contractual relationship with the Gettys.

Additionally, the actor's knowledge of the contractual right allegedly breached bears upon the motive factor. An actor cannot readily be found to be motivated by an intention to interfere with a contract of which he is unaware. Here, Texaco's knowledge of Pennzoil's alleged contractual rights was vigorously contested by the parties. Texaco argued that it was unaware of the oral discussions that allegedly gave rise to the contract, and that all of the information available to it, including solicitation and assurances from representatives of Getty, and the advice of Texaco legal counsel, indicated that no binding contract existed.

Relying upon the erroneous charge, the jury could nonetheless have found Texaco liable merely if it found that a contract existed, whether or not Texaco had any basis to believe that to the case. Indeed, the jury could have found that Texaco's limited knowledge of or interference with pre-

contractual relations, an agreement to agree or an unenforceable contract was sufficient for holding Texaco liable for intentional interference with contract.

In this case, the third factor—the Pennzoil interests with which Texaco's conduct interfered—should have been given careful attention. Texaco contests the substantiality of those interests. It argues that Pennzoil and the Gettys never entered into a contract because the parties were still in the pre-contractual negotiations stage. Alternatively, Texaco contends that if a contract was formed it was either void or unenforceable (voidable) because it violated federal securities laws and the fiduciary responsibilities of Getty directors and was merely an agreement to agree. Even if the jury believed Texaco's evidence on this point and found there was no binding contract, it nevertheless might have felt constrained, in view of the defects in the jury charge, to hold that Texaco's interference with the Pennzoil-Getty negotiations by lawful means, such as persuasion or an offer of better terms, was improper. This too was reversible error.

With respect to the fourth factor, the interests Texaco sought to advance, Texaco argues plausibly that it sought to further not only its own economic interests, but also those of thousands of Getty Oil shareholders. Furthermore, the interest of the public was also advanced by Texaco's conduct, it asserts; its higher bid for the stock of Getty Oil insured open and vigorous competition for control of a major publicly-owned corporation the assets of which include vast holdings of vital natural resources.

The correlation between this factor and the fifth factor, social interest, is strong. There is arguably great value in having open competition for the assets and control of a major corporation such as Getty Oil. Where, as here, the social utility of an alleged interferer's conduct is high and no wrongful means were employed, the beneficial result of the alleged tortfeasor's action may "require the sacrifice of the claims of

individuals to freedom from interference." Restatement § 767 comment g.[4]

In sum, the jury should have been instructed to assess whether Texaco's conduct was proper in view of all the circumstances, including the nature of Pennzoil's contractual relations; the Gettys' solicitation of higher bids from other investors, including Texaco; the limited information available to Texaco describing whether a contract existed between Pennzoil and the Gettys; the fiduciary duty of the Getty directors to obtain fair value for their shareholders' stock; the interests of those shareholders which were advanced by Texaco's conduct; and the open market, competitive values which were fostered by Texaco's higher bid. *Compare* NY PJI 3:56. The trial judge's failure to give some guidance along these lines was reversible error.

II

THE SPECIAL ISSUES AND JURY INSTRUCTIONS PERTAINING TO PUNITIVE DAMAGES WERE INADEQUATE.

Special Issue No. 4 states:

> Do you find from a preponderence of the evidence that Texaco's actions, if any, were intentional, willful and in wanton disregard of the rights of Pennzoil, if any?

The court referred the jury to Special Issue No. 5 if its answer was affirmative. No jury instructions accompanied Special Issue No. 4. Special Issue No. 5 asked the jury what amount of punitive damages should be awarded to Pennzoil. It was accompanied by a jury instruction which stated:

> Punitive damages means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages.

---

[4] The final factors—proximity or remoteness of the actor's conduct to the interference, and relations between the parties—are not subject to much dispute. If interference occurred, it was direct; Texaco and Pennzoil are business competitors in the oil industry.

This portion of the jury charge, especially the jury instruction, was wholly inadequate. The jury instruction failed to describe the limited circumstances under which an award of punitive damages is appropriate. Instead, the instruction stated simply and simplistically that punitive damages may be awarded in the *discretion* of the jury. This formulation is far more liberal than the standard applied under New York law.

Before charging on punitive damages, a trial court applying New York law must decide whether there is a reasonable basis in the evidence for the jury to find that the defendant's conduct was so gross or wanton as to justify an award of such damages. NY PJI Supp. at 287. Generally, awards of punitive damages are not encouraged. The claimant must present evidence of "actual malice or ill will," *Anthony v. George T. Bye, Inc.*, 243 A.D. 390, 391, 277 N.Y.S. 222, 223 (1st Dept. 1935); a wrong "morally culpable" or "actuated by evil and reprehensible motives," *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490, (1961); or a wrongful action "done willfully, wantonly or maliciously." *Huschle v. Battelle*, 33 A.D.2d 1017, 308 N.Y.S.2d 235 (1st Dept. 1970). *See Guard-Life Corp. v. S. Parker Hardware Mfg.*, 67 A.D.2d 658, 412 N.Y.S.2d 623 (1st Dept. 1979), *modified on other grounds*, 50 N.Y.2d 183, 428 N.Y.S. 2d 628 (1980)[5]. Moreover, punitive damages are imposed solely for the purpose of vindicating a public right; they are available only where the actions of the alleged tortfeasor are aimed at the public generally or are activated by evil or reprehensible motives. *Walker v. Sheldon; Gravitt v. Newman*, A.D.2d , 495 N.Y.S.2d 439 (2d Dept. 1985); *Philippson v. Hexalon Real Estate, Inc.*, 111 A.D.2d 126, 489 N.Y.S.2d 506 (1st Dept. 1985).

---

[5] Pattern Jury Instruction 2:278 instructs that punitive damages are justified only when defendant's action was wanton and reckless or malicious. Moreover, contrary to the jury charge here, PJI 2:278 defines those terms:

> An act is wanton and reckless when it is done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the result upon the rights and safety of others that may flow from the doing of the act or the manner in which it is done. An act is malicious when it is done deliberately with knowledge of plaintiff's rights, and with the intent to interfere therewith.

Given all the circumstances of this case, and the undisputed assertion that Texaco was motivated to secure an advantageous business relationship, rather than to injure Pennzoil, the trial court had no discernible basis to conclude that Texaco's conduct could fairly be characterized as wanton, reckless or malicious. Texaco's brief argues generally and with some force that its conduct promoted, rather than harmed, the public interest; that its higher bid increased the profits of Getty's thousands of shareholders and assisted Getty's directors in discharging their fiduciary responsibility to protect the interests of their shareholders; that open competition for Getty's stock, advanced by Texaco's higher bid, was in the interests of the public at large; and that acquisition and control of the assets of a major corporation, such as Getty Oil, is decided most responsibly in an open, competitive forum. The trial judge simply brushed aside these contentions and, in essence, dropped the whole matter in the jury's lap.

Accordingly, Special Issues Nos. 4 and 5 and the accompanying jury instruction are erroneous and may have materially prejudiced Texaco's case. Indeed, as formulated, Special Issue No. 4 erroneously permits the jury, in its discretion, to award punitive damages merely upon finding that Texaco's conduct was intentional and willful.[6] For all these reasons, the award of punitive damages should be reversed.

---

[6] Although Special Issue No. 4 includes a reference to "wanton disregard," neither the special issue nor the jury instruction defines that term. Therefore, it should not be assumed that the jury found Texaco's conduct to be in wanton disregard of Pennzoil's alleged interests.

III

CERTIFICATION OF THE DISPOSITIVE QUESTIONS OF NEW YORK LAW TO THE COURT OF APPEALS OF NEW YORK IS APPROPRIATE IF THIS COURT CONCLUDES THAT NEW YORK LAW IS UNCLEAR.

This brief seeks to describe how the jury charge below substantially misstated the applicable New York caselaw. We believe that, as it pertains to the facts presented here, New York's law is clear. Nonetheless, in the event this Court finds that New York law on these issues is not clear, it should request the Texas Supreme Court to certify the dispositive questions of law to the New York Court of Appeals on the ground that there is no controlling precedent of the Court of Appeals. *See* Rule 500.17, Rules of New York Court of Appeals, N.Y. Admin. Code tit 22, § 500.17 (1986). In view of the great significance of these questions of law to New York, we believe the Court of Appeals is the appropriate forum to create or clarify the standards governing the facts of this case. Accordingly, we join in Texaco's certification request and endorse the procedure it describes for accomplishing the certification (Br. 116).

CONCLUSION

For all the foregoing reasons, the State of New York, as *amicus curiae*, requests that this Court reverse the judgment below. Alternatively, the Court should certify the dispositive questions of law to the Court of Appeals of New York.

Dated: New York, New York
May 12, 1986

Respectfully submitted

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amicus Curiae
Office & P.O. Address
Two World Trade Center
Room 47-24
New York, New York 10047
(212) 488-3710

ROBERT HERMANN
Solicitor General of the State
of New York

COLVIN W. GRANNUM
Assistant Attorney General

Of Counsel

APPENDIX B

No. 01-86-00216-CV

IN THE

Court of Appeals

FOR THE

First Supreme Judicial District of Texas

TEXACO INC.,
Appellant,

v.

PENNZOIL COMPANY,
Appellee.

ON APPEAL FROM THE 151ST DISTRICT COURT,
HARRIS COUNTY, TEXAS

BRIEF *AMICUS CURIAE* OF THE STATE OF DELAWARE*

* Reprinted to comply with Supreme Court Rule 33.

TABLE OF CONTENTS

	Page
THE INTEREST OF THE *AMICUS CURIAE* IN THIS APPEAL	B-1
SUMMARY OF ARGUMENT	B-3
ARGUMENT	B-4
I. THE COURT'S INSTRUCTION CONCERNING THE GETTY BOARD'S FIDUCIARY DUTIES IS INCORRECT AS A MATTER OF LAW	B-4
A. The Getty Board's Fiduciary Duties Required That It Fully Inform Itself Of All Material Facts And Make All Reasonable Efforts To Secure The Highest Price	B-4
B. Delaware Law Prohibits Enforcement Of An Agreement Entered Into In Breach Of Directors' Fiduciary Duties	B-6
II. THE PURPORTED AGREEMENT BETWEEN GETTY AND PENNZOIL IS UNENFORCEABLE UNDER DELAWARE LAW	B-8
CONCLUSION	B-12

TABLE OF CASES AND AUTHORITIES

CASES	Page
Aronson v. Lewis, 473 A.2d 805 (Del. 1984)	B-4
Beard v. Elster, 160 A.2d 731 (Del. 1960)	B-3
ConAgra, Inc. v. Cargill, Inc., 382 N.W.2d 576 (Neb. 1986)	B-7
Elster v. American Airlines, 100 A.2d 219 (Del. Ch. 1953)	B-3
Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974)	B-11
Hecco Ventures v. Sea-Land Corp., C.A. No. 8486 (Del. Ch. May 19, 1986)	B-7
In re Anderson, Clayton Shareholders Litigation, C.A. No. 8387 (Del. Ch. June 2, 1986)	B-11
Lockwood v. OFB Corp., 305 A.2d 636 (Del. Ch. 1973)	B-5
Mau v. Montana Pacific Oil Co., 141 A. 828 (Del. Ch. 1928)	B-3
Mitchell v. Highland-Western Glass Co., 167 A. 831 (Del. Ch. 1933)	B-4
Mullen v. Academy Life Insurance Co., 705 F.2d 971 (8th Cir.), *cert. denied sub nom. Beausang v. Mullen*, 464 U.S. 827 (1983)	B-1
Palmer v. Arden-Mayfair, Inc., C.A. No. 5549 (Del. Ch. July 6, 1978)	B-3
Pennsylvania Co. v. Wilmington Trust Co., 186 A.2d 751 (Del. Ch. 1962), *aff'd sub nom. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964)	B-5
Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)	B-6, B-7, B-8, B-9, B-10
Robinson v. Pittsburgh Oil Refining Corp., 126 A. 46 (Del. Ch. 1924)	B-5

Page

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) B-5, B-9, B-10, B-11

Thomas v. Kempner, C.A. No. 4138 (Del. Ch. Mar. 22, 1973) B-7

Thompson v. Enstar Corp., C.A. Nos. 7641 & 7643 (Del. Ch. June 20, 1984, revised July 5, 1984 and August 16, 1984) B-7

AUTHORITIES

Restatement (Second) of Conflict of Laws § 302(2), comment (e) (1969) B-3

8 *Del. C.* § 251(b) B-5

The Interest of the *Amicus Curiae* in This Appeal

More than 165,000 large and small businesses—including Getty Oil Company ("Getty"), Texaco Inc. ("Texaco") and Pennzoil Company ("Pennzoil")—are incorporated under the laws of Delaware. Among these businesses are firms representing a majority of the "Fortune 500" companies, over 40 percent of the firms listed on the New York Stock Exchange and about 38 percent of those listed on the American Stock Exchange. Delaware receives approximately $122 million in fees and franchise taxes each year from these companies.

Businesses have chosen to incorporate in Delaware because Delaware's statutory and case law generally provides a clear and responsible statement of the basic rules governing corporate conduct. Delaware has a compelling interest in the fair and accurate enforcement of its laws by other states, because Delaware law governs the rights and duties of all Delaware corporations, and because of the importance of its corporation law to the State.[1]

The State of Delaware, by its Attorney General, Charles M. Oberly, III, has concluded that fundamental principles of Delaware law governing the fiduciary duties of directors of Delaware corporations have not been reflected properly in the judgment below. This brief is submitted by the State of Delaware, as *amicus curiae*, for the purpose of correcting that error.

The State of Delaware is also concerned that this error in the judgment below will have an adverse effect on the continued viability of Texaco. Texaco is important to Delaware, both as a corporate citizen and as a direct and indirect employer of Delaware's residents. Texaco's assets located in Delaware, primarily in the Delaware City Refinery, are valued at more than $400 million. Texaco directly employs almost 700 Dela-

---

[1] Moreover, "[t]he courts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law." *Mullen v. Academy Life Insurance Co.*, 705 F.2d 971, 973 n.3 (8th Cir.), *cert. denied sub nom. Beausang v. Mullen*, 464 U.S. 827 (1983).

ware residents and its 1985 payroll in the State exceeded $32 million. Texaco paid over $7 million in State and local taxes in 1985. Delaware also benefits from the substantial tax revenues paid by Texaco's employees residing in Delaware.[2]

As set forth more fully below, the judgment of the trial court resulted from an incorrect application of Delaware law. The State of Delaware, therefore, respectfully requests that the judgment of the court below be reversed.

---

[2] In addition, Texaco does substantial business with other companies and individuals in the State of Delaware. It has over 70 branded outlets in Delaware and transacts business with approximately 1,000 local suppliers. From 1983 through 1985, Texaco invested over $27 million in major projects within the State of Delaware.

Summary of Argument

1. The parties agree, and the law is clear, that the fiduciary duties of the board of directors of a Delaware corporation are governed by Delaware law. *See Palmer v. Arden-Mayfair, Inc.*, C.A. No. 5549, slip op. at 20 (Del. Ch. July 6, 1978); *Beard v. Elster*, 160 A.2d 731 (Del. 1960); *Elster v. American Airlines*, 100 A.2d 219 (Del. Ch. 1953); *Mau v. Montana Pacific Oil Co.*, 141 A. 828 (Del. Ch. 1928); *see also* Restatement (Second) of Conflict of Laws § 302(2), comment (e) (1969).

2. The instructions given by the trial court required the jury to ignore the fiduciary obligations of the Getty Oil Company's Board of Directors (the "Getty Board") and that the failure to fulfill those obligations would render an agreement between the Getty Oil Company ("Getty Oil") and Pennzoil unenforceable. Pennzoil does not dispute that unenforceability of an agreement constitutes a defense to tortious interference with contract.

3. The undisputed facts demonstrate that the Getty Board failed to fulfill its fiduciary obligations and did not enter into an enforceable agreement that could form the basis for a claim against Texaco of tortious interference with contract.

ARGUMENT

I. THE COURT'S INSTRUCTION CONCERNING THE GETTY BOARD'S FIDUCIARY DUTIES IS INCORRECT AS A MATTER OF LAW.

Pennzoil has conceded that Instruction No. 5 to Special Issue No. 2 directed the jury to ignore the obligation of the Getty Board to fulfill its fiduciary duties.[3] The Getty Board's failure to fulfill those duties would make any agreement between Pennzoil and Getty unenforceable. This Instruction, therefore, removed from the case a potentially controlling issue of Delaware law and constitutes plain error.[4]

A. The Getty Board's Fiduciary Duties Required That It Fully Inform Itself Of All Material Facts And Make All Reasonable Efforts To Secure The Highest Price.

Delaware law requires that members of the board of directors of a Delaware corporation fulfill their duty of care to inform themselves "prior to making a business decision, of all material information reasonably available to them." *Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984). An agreement is not enforceable if based on "an unintelligent and unadvised judgment." *Mitchell v. Highland-Western Glass Co.,* 167 A. 831, 833 (Del. Ch. 1933).

---

[3] Pennzoil admitted that this Instruction "advised the jury that the status of the Getty entities as fiduciaries was not relevant to the interference issue," the effect of which was to "exclud[e] evidence from the jury's consideration . . . ." Pennzoil Brief at 155.

[4] Special Issue No. 2 states:

> Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Instruction No. 5 states:

> You may find that Texaco knowingly interfered with the Pennzoil agreement, if any, even though the Getty Oil directors, the Museum's President, and Gordon P. Getty, Trustee, were fiduciaries. If those fiduciaries intended to be bound to an agreement with Pennzoil on January 3, they could not avoid that agreement by later seeking or accepting a higher price or a more beneficial arrangement with a third party.

Thus, fulfillment of a board's fiduciary duties "requires more than the mere absence of bad faith or fraud." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). Rather, "[r]epresentation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information. . . ." *Id.*

The Getty Board's duty fully to inform itself before entering into a merger agreement also is mandated by statute. The Delaware Supreme Court has emphasized that:

> [i]n the specific context of a proposed merger of domestic corporations, a director has a duty under 8 *Del. C.* § 251(b), along with his fellow directors, to act *in an informed and deliberate manner* in determining whether to approve an agreement of merger before submitting the proposal to the stockholders.

Id. at 873 (emphasis added, footnote omitted).

Moreover, when a board authorizes the sale of the corporation, its duty to act in an informed and deliberate manner requires that it act as "auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). A board may not agree precipitously to foreclose bidding under such circumstances. *Id.* at 184. Nor can a board fulfill its fiduciary duties by waiting passively for unsolicited bids to come to its attention. Instead, its role in seeking the highest price and protecting the interests of the shareholders must be "an active one." *Id.* at 184 n. 16.[5]

Instruction No. 5 to Special Issue No. 2 directed the jury to ignore these fundamental rules of Delaware law. The Instruction was plain error, and the judgment of the court below, therefore, should be reversed.

---

[5] *See also Lockwood v. OFB Corp.*, 305 A.2d 636 (Del. Ch. 1973); *Pennsylvania Co. v. Wilmington Trust Co.*, 186 A.2d 751 (Del. Ch. 1962), *aff'd sub nom. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964); *Robinson v. Pittsburgh Oil Refining Corp.*, 126 A. 46 (Del. Ch. 1924).

B. Delaware Law Prohibits Enforcement Of An Agreement Entered Into In Breach Of Directors' Fiduciary Duties.

Instruction No. 5 to Special Issue No. 2 was also inherently defective in that it suggested to the jury that the Getty Board's "inten[tion] to be bound" was sufficient to cause an agreement with Pennzoil to be enforceable. The Instruction directed the jury to disregard the fundamental rule that an agreement will not be enforced when it is entered into in violation of the directors' fiduciary duties.

Lock-ups and related agreements are permitted under Delaware law when their adoption is untainted by breaches of a board's fiduciary duties. In some circumstances such agreements may encourage other bidders to enter the market for control of the corporation, creating an auction for the company and maximizing shareholder wealth. *Revlon*, 506 A.2d at 176, 183.

Agreements which "end an active auction and foreclose further bidding operate to the shareholders' detriment," however, and will not be enforced. *Id.* at 183. In *Revlon*, the Delaware Supreme Court condemned as a breach of fiduciary duty the Revlon board's termination of the bidding process and upheld an injunction against lock-up and no-shopping provisions of a merger agreement which had prevented the auction that should have been conducted. The court reasoned that:

> The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the *maximization of the company's value* at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with *getting the best price* for the stockholders at a sale of the Company.

Revlon, 506 A.2d at 182 (emphasis added).[6] The Revlon directors violated that duty, and the resulting agreement was enjoined.

The Delaware Court of Chancery in *Thomas v. Kempner*, C.A. No. 4138, slip op. at 12 (Del. Ch. Mar. 22, 1973), similarly refused to enforce an assets acquisition agreement "which appears to have been designed to obtain less than the maximum price available for corporate assets because the principle of competitive bidding was ignored."

Agreements which interrupt an active auction process may not be enforced. Only at the conclusion of an auction, when directors already have explored fully the potential for higher offers, may the board bind itself not to pursue higher offers. *See, e.g., Thompson v. Enstar Corp.*, C.A. Nos. 7641 & 7643, slip op. at 7 (Del. Ch. June 20, 1984, revised July 5, 1984 and August 16, 1984) (agreement upheld "after an extensive search for potential buyers . . . for over a month, and after contact with over 100 prospects, and after an in-depth review by 26 seriously interested buyers" resulting in only "one firm offer"); *Hecco Ventures v. Sea-Land Corp.*, C.A. No. 8486, slip op. at 11-12 (Del. Ch. May 19, 1986) (agreement upheld after a five-month search, when "no other bidder has come forward, no one else has offered more . . . and there is no evidence that anyone else may or will"; agreement reached "at the conclusion (and not, as in *Revlon*, in the midst) of the auction process").

---

[6] The decision in *ConAgra, Inc. v. Cargill, Inc.*, 382 N.W.2d 576 (Neb. 1986), applying Delaware law, is consistent with *Revlon*. In *ConAgra*, the court held that a "best-efforts" agreement to support the initial offeror could not relieve the board of its duty to recommend for shareholder approval a later offer that represented a better deal to shareholders. *Id.* at 588. Under the plaintiff's theory in that case, the "best efforts" agreement would have required the board to contract away duties—the continuing obligation to exercise its independent judgment in the shareholders' best interests—that they lacked authority to convey. The court ruled that such an agreement was unenforceable and could, therefore, convey no contractual rights which would support plaintiff's tortious interference claim against the subsequently successful offeror. *Id.* at 587-88.

As *Revlon* demonstrates, some agreements which have "destructive effect[s] on the auction process" are unenforceable under Delaware law. Instruction No. 5 to Special Issue No. 2 precluded consideration of these fundamental principles. The jury was misinformed that enforceability of the purported agreement with Pennzoil was determined solely by the directors' "inten[tion] to be bound."

The Instruction was plain error, and the judgment of the court below should be reversed.[7]

II. THE PURPORTED AGREEMENT BETWEEN GETTY AND PENNZOIL IS UNENFORCEABLE UNDER DELAWARE LAW.

Certain facts in the record are undisputed. On the evening of January 2, Getty's investment banker, Goldman, Sachs & Co. ("Goldman Sachs"), informed the Getty Board that $120 per share—$7.50 *more* than Pennzoil's final offer—was the minimum "threshold" fair price for the sale of the company. The Getty Board then specifically requested that Goldman Sachs seek higher offers than the one made by Pennzoil. Goldman Sachs did so.

By the following day, a number of parties told Goldman Sachs that they were interested in making a offer higher than the one made by Pennzoil. Notwithstanding their investment banker's advice on the minimum acceptable fair price and the new information regarding other interested parties, the jury found that on January 3, only 24 hours after the auction had begun, the Getty Board accepted the Pennzoil offer.

Pennzoil's own brief concedes that:

> The board was not forced to approve the Pennzoil transaction. Pennzoil could not purchase Getty Oil shares

[7] Instruction No. 5 to Special Issue No. 2 also constituted error in that it, in substance, directed the jury that if an agreement between Getty and Pennzoil existed, implicit in that agreement was a no-shopping provision. Whether the parties agreed to a no-shopping provision was an issue for the jury and not a proper subject for a court direction.

> under its tender offer for two more weeks. PX 68; SF 3440, 3444, 3882, Kerr; 9962-63, 10091, 11567, Liedtke. The board had ample time, for example, to authorize negotiations with the third parties contacted by Boisi [Getty's investment banker] who had shown interest in paying a higher price but had not yet made offers. SF 10091-93, Liedtke. Instead, the board opted for the certainty offered by the Pennzoil agreement. *As [Getty] board chairman Petersen later admitted: "We thought there was a better deal out there,* but it was a bird-in-the-handish situation. We approved the deal but we didn't favor it." PX 130; SF 5413-14, Petersen; 5510, Nulty.

Pennzoil Brief at 29 (emphasis added).

The entire auction process and negotiation of this extraordinarily complex four-party transaction, involving many billions of dollars, was restricted to a period of 24 hours, "without the exigency of a crisis or emergency." *Smith v. Van Gorkom*, 488 A.2d at 874.[8] Moreover, the bidding process was terminated without allowing any opportunity for the formulation, presentation and analysis of alternative bids. Only two days later, on January 5, Texaco offered $125 per share, $12.50 per share more than Pennzoil had offered, and later increased the offer to $128 per share. Delaware law would not enforce an agreement of merger that had been negotiated and entered into under these circumstances.

As demonstrated in the previous section of this brief, *Revlon* holds that when a decision was made "that the company was for sale," the Getty Board's role became that of "auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon*, 506 A.2d at 182. *Revlon* forbids agreements which end an active auction and foreclose further bidding, because such agreements operate to the shareholders' detriment.

---

[8] The Getty Board meeting "continued . . . from 6:00 p.m. on January 2, 1984 until 6:57 p.m. on January 3." Pennzoil Brief at 22.

Here, the uncontradicted facts demonstrate that the Getty Board decided to terminate the bidding process only hours after it had begun and before firm alternative bids—which Getty had solicited in recognition of the fact that Pennzoil's offer was inadequate—could be formulated. This decision by the Getty Board was worse than the one struck down in *Revlon*. A clearer violation of the *Revlon* duty to act as auctioneers and obtain the highest available price would be difficult to imagine. As in *Revlon*, the purported agreement which resulted could not be enforced.

Moreover, not only did the Getty Board fail to seek and obtain the highest price, it failed even to seek a price that its own investment banker considered to be fair. Even in *Revlon*, the board's investment banker at least had approved the fairness of the price per share that Revlon shareholders would receive pursuant to the merger agreement. Here, the Getty Board's investment banker told the Getty Board that $120 per share—$7.50 more per share than Pennzoil's final offer—was the minimum "threshold" fair price for a sale of the company.[9]

We are aware of no case which approves of a board accepting a merger at a price that its own investment banker considered to be below fair value.[10] Indeed, in *Smith v. Van Gorkom*, 488 A.2d at 877 n.19, a breach of fiduciary duty was found in approving a merger agreement when the Chairman of the Board "had deliberately chosen to ignore the advice and opinion of the members of his Senior Management group

[9] Pennzoil's brief concedes that even after the Getty Board meeting on January 3, Getty's investment banker was " 'mad' and a little 'embarrassed' that the Getty Oil board had not held out for a higher price . . . . " Pennzoil Brief at 40.

[10] The lock-up provision rejected in *Revlon* was objectionable precisely because Revlon had agreed to sell two of its divisions for an amount "$100-$175 million below the value ascribed to them by Lazard Freres," Revlon's investment banker. *Revlon*, 506 A.2d at 178.

regarding the adequacy of the $55 price" and the board was not so advised.[11]

After receiving advice that the Pennzoil offer was inadequate and that other parties were interested in making higher offers, "[s]urely the obligation of the [Getty] board at this time [was] to explore in good faith an alternative that, if available, would appear to have a significantly greater present value than [the Pennzoil offer]." *In re Anderson, Clayton Shareholders Litigation*, C.A. No. 8387, slip op. at 7 (Del. Ch. June 2, 1986). The Getty Board did not fulfill that "obligation." Instead, it made a "forced decision on a tight time schedule" without adequate information that deprived it of an "opportunity to make a reasonable and reasoned decision." *Gimbel v. Signal Cos.*, 316 A.2d 599, 614-15 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).[12]

* * *

[11] That the investment banker for the Sarah C. Getty Trust ("Trust") considered the Pennzoil offer to be fair is of no consequence. Pursuant to the agreement with Pennzoil, the Trust was increasing its ownership interest in Getty from 40.2 to 57 percent without investing any money. The trustee's duty to the Trust beneficiaries was to retain as much money as possible in Getty and to have Getty pay the lowest possible price to public shareholders.

[12] Pennzoil's argument that informed shareholder approval by the J. Paul Getty Museum and the Trust cured any breach by the Getty Board of its fiduciary duties is contrary to Delaware law. In *Smith v. Van Gorkom*, 488 A.2d at 873, the Delaware Supreme Court stated:

> In the specific context of a proposed merger of domestic corporations, *a director has a duty* under 8 *Del. C.* § 251(b), along with his fellow directors, *to act in an informed and deliberate manner* in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. *Certainly in the merger context, a director may not abdicate that duty by leaving to the shareholders alone the decision to approve or disapprove the agreement. See Beard v. Elster*, Del. Supr., 160 A.2d. 731, 737 (1960). *Only an agreement of merger satisfying the requirements of 8 Del. C. § 251(b) may be submitted to the shareholders under § 251(c). See generally Aronson v. Lewis, supra* at 811-13; *see also Pogostin v. Rice, supra.*

(Emphasis added, footnote omitted).

As a matter of Delaware law, the purported agreement between Pennzoil and Getty, as apparently found by the jury, could only have been achieved at the expense of the Getty Board's fulfillment of its fiduciary duties. The State of Delaware respectfully requests that the judgment of the court below be reversed.[13]

CONCLUSION

For the reasons given, and based upon the authorities cited in the foregoing sections of this brief, the State of Delaware respectfully requests that the judgment of the court below be reversed.

s/ Fred S. Silverman

Charles M. Oberly, III
Attorney General of the State of Delaware
Attorney for *Amicus Curiae*
By Fred S. Silverman
Delaware State Solicitor
Carvel State Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3836

[13] The State of Delaware emphasizes that the facts referred to in the foregoing sections of its brief have been taken largely from Pennzoil's brief, and therefore assume, for the sake of argument only, that a contract was entered into between Pennzoil and Getty on January 3. The State of Delaware is fully aware that Texaco asserts that no such contract ever existed and that, therefore, the directors of Getty acted properly, and in a manner consistent with their *Revlon* duties, in entering into the agreement with Texaco at a price far in excess of that offered by Pennzoil.

Nothing in this brief should be construed to suggest that the State of Delaware agrees that a contract was formed between Pennzoil and Getty or that the directors of Getty did not comply fully in all respects with their fiduciary duties under Delaware law.

FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1798

IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,
Appellant,

v.

TEXACO INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE BUSINESS COUNCIL OF NEW YORK STATE, INC.; NATIONAL ASSOCIATION OF TEXACO WHOLESALERS; OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (AFL-CIO); TEXAS AFL-CIO; NEW YORK STATE AFL-CIO; AND NEW YORK STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

John Carter Rice
(Counsel of Record)
Rice & Justice
96 South Swan Street,
Albany, New York 12210
(518) 434-8435

ATTORNEYS FOR AMICUS
CURIAE, THE BUSINESS
COUNCIL OF NEW YORK
STATE, INC.

[List of Additional Counsel on Inside Cover]

Gregg R. Potvin
Southmayd, Powell,
Taylor & Bonen
1015 15th Street, N.W.
6th Floor
Washington, D.C. 20005
(202) 797-8822

ATTORNEYS FOR AMICUS CURIAE, NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

John W. McKendree
Law Offices of
John W. McKendree
Creswell Mansion
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

ATTORNEY FOR AMICUS CURIAE, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (AFL-CIO)

David Van Os
General Counsel
P.O. Box 26946
Austin, Texas 78755
(512) 477-6195

ATTORNEY FOR AMICUS CURIAE, TEXAS AFL-CIO

Richard L. O'Hara
Colleran, O'Hara & Mills, P.C.
267 East Jericho Turnpike
Mineola, New York 11501-2133
(516) 248-5757

ATTORNEYS FOR AMICUS CURIAE, NEW YORK STATE AFL-CIO AND AMICUS CURIAE, NEW YORK STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

No. 85-1798

IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE BUSINESS COUNCIL OF NEW YORK STATE, INC.; NATIONAL ASSOCIATION OF TEXACO WHOLESALERS; OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (AFL-CIO); TEXAS AFL-CIO; NEW YORK STATE AFL-CIO; AND NEW YORK STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

The Business Council of New York State, Inc. ("Business Council"); National Association of Texaco Wholesalers ("NATW"); Oil, Chemical and Atomic Workers International Union, AFL-CIO ("OCAW"); Texas AFL-CIO; New York State AFL-CIO; and New York State Building and Construction Trades Council ("Trades Council"), submit this brief to urge this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

Each of the signatories to this brief is confident that the issues in this case will be exhaustively and effectively briefed by the parties and, therefore, we will not burden this Court by fully addressing the

merits of this appeal. Nevertheless, we wish to apprise the Court of our interest in this matter and to state our belief that the public interest will be best served by safeguarding Texaco's federal constitutional right to pursue a meaningful appeal in the courts of the State of Texas free of conditions which in this case are both irrational and impossible.

The varied constituencies represented by the organizations submitting this brief include individuals and organizations whose interest could be irreparably and unnecessarily damaged if this Court were to reverse the decision of the Second Circuit upholding the limited injunctive relief granted by the District Court for the Southern District of New York.

The Business Council is a not-for-profit corporation organized and existing under the laws of the State of New York. The Business Council represents over 3,000 individual businesses, including over 100 of the Fortune 500 companies, employing millions of men and women in New York and across the nation. The Business Council not only appeared *amicus curiae* in the court below, but also appeared as an *amicus* in the state appellate court of Texas, where the merits of the $11.12 billion judgment have been argued without any interference from the federal court's limited injunctive relief. In its *amicus* brief to the Texas Court of Appeals, the Business Council urged that "the judgment of the trial court, if not reversed, will create uncertainty and unpredictability in areas of commercial activity that require certainty and predictability for the national economy to flourish." The irreparable damage to Texaco that would result from a reversal of the decision below would adversely affect other members of the Business Council (as well as the members' employees, customers and the general public), which directly and indirectly benefit from the business activity of Texaco.

OCAW is the foremost labor organization in the oil industry. It represents approximately 40,000 employees in the oil industry, including over 5,000 Texaco employees and has in effect over 300 collective bargaining agreements with employers in the oil industry. It is affiliated with the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and the Texas AFL-CIO which has its headquarters in Austin, Texas. The Texas AFL-CIO is comprised of a large number of industrial and craft unions rooted in the former American Federation of Labor ("AFL") and the Congress of Industrial Organizations ("CIO"). In 1955, these unions merged to become AFL-CIO. Typifying the unions within the Texas AFL-CIO are various local unions of OCAW, the Office of

Professional Employees International Union ("OPEIU"), the International Brotherhood of Electrical Workers ("IBEW"), the International Union of Operating Engineers ("IUOE"), the International Association of Machinists and Aerospace Workers ("IAM"), the United Brotherhood of Carpenters and Joiners of America ("Carpenters"), the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("Pipefitters"), and the United Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers ("Boilermakers") — all of whom represent employees within the oil industry. Its sister union, the New York State AFL-CIO has a membership in excess of two million union workers throughout New York State. The purpose of both the Texas AFL-CIO and the New York State AFL-CIO is to represent, through united action, the interests of its membership with respect to significant labor issues that arise within the legislative and judicial branches of government. In this connection, these unions also represent the interests of numerous trustees of pension, annuity and other employee benefit funds. In the past, both have been a party to, or filed *amicus* briefs in, lawsuits involving labor and employment issues of importance to its membership in state and federal courts. Affiliated with the New York State AFL-CIO is the New York State Building and Construction Trades Council, which has a membership of approximately two hundred and fifty thousand workers throughout New York State. The council consists of twenty-two regional area Building and Construction Trades Councils, which effectively represent the majority of the unionized construction workers with the State of New York. The Council's primary objective is to represent, through united action, the interests of working people on significant labor and employment issues in the legislative and judicial branches of government.

Because of the size of the judgment, the outcome of this case will have a tremendous economic effect on the oil industry and labor. The effect of the judgment on labor will extend far beyond the displacement of many thousands of Texaco employees and the adverse impact on many more thousands of former employees. The judgment will undoubtedly have a ripple effect on the livelihoods of thousands of employees of businesses dependent upon or associated with Texaco or its employees. The devastating effects of the judgment on so many working men and women and their families would be especially tragic if it were to occur before there can be full review of issues that are sufficiently serious that the States of New York and Delaware both have appeared as *amicus* in the Texas Court of Appeals to urge reversal because their law was misapplied by the Texas trial judge.

NATW was founded as a non-profit organization in 1974 by small independent marketers of Texaco products. The organization is unaffiliated with Texaco and, indeed, frequently finds itself in an adversarial relationship with Texaco. A primary objective of NATW is to enhance communications regarding problems facing the petroleum industry between its members and agencies of the state and federal governments, Texaco and other petroleum associations. NATW believes the judgment to be wrong — practically, legally and morally — and urges this Court to uphold the federal relief required so that the Texas state courts can have the opportunity to review and reverse that judgment.

Notwithstanding the differing purposes which each of our organizations serves, we are in agreement that the interests we represent, as well as the interests of the nation as a whole, would best be served by ensuring Texaco a meaningful right to pursue its appellate remedies in the courts of the State of Texas, and, if necessary, in this Court. Each of us, therefore, urges that the limited relief granted by the district court and upheld by the Second Circuit, which will in no way interfere with the Texas appellate courts' power and duty to adjudicate Texaco's appeal, represents a reasonable and prudent exercise of federal power.

For these reasons, we respectfully request that this Court recognize the irreparable and irreversible harm that could be done not only to our constituents, but to the interests of the general public. We urge affirmance of the decision below.

Dated: November 4, 1986

Respectfully submitted,

Texas AFL-CIO

By: David Van Os

New York State AFL-CIO; New York State Building and Construction Trades Council

By: Richard L. O'Hara

The Business Council of New York State, Inc.

By: John Carter Rice*

National Association of Texaco Wholesalers

By: Gregg R. Potvin

Oil, Chemical and Atomic Workers International Union (AFL-CIO)

By: John W. McKendree

*Counsel of Record